# TRIAL COURT UNIFICATION:
# SELECTED BACKGROUND MATERIALS



Court Reform Task Force
Ministry of the Attorney General
September, 1990

**TABLE OF CONTENTS**

"The Concept of a Single Court"
paper by former Attorney General Ian Scott ---------- 1

"Lower Criminal Courts", excerpt from The Judiciary in Canada: The Third Branch of Government, by Peter H. Russell ---------- 2

"Unified Criminal Court and Appeal Court Reform" (draft discussion paper produced by the Court Reform Task Force) ---- 3



KF
8732
O582
1990
c.1

Ontario. Court Reform Task Force
TRIAL COURT UNIFICATION:
SELECTED BACKGROUND
MATERIALS

PAPER PRESENTED BY

THE HONOURABLE IAN SCOTT
ATTORNEY GENERAL

TO

CIVIL LITIGATION SEMINAR
MONT STE. MARIE
NOVEMBER 17 AND 18, 1989

ON

# "THE CONCEPT OF A SINGLE COURT"

Introduction

Shortly after being appointed Attorney General in 1985 I expressed the wish to visit each of the forty-nine counties and districts in Ontario. Initially the purpose of the trip was to introduce myself to court staff across the province many of whom had never met the Attorney General for whom they worked. In my first eighteen months in office I visited most of the more than 230 locations where court is conducted in Ontario on a daily, weekly or bi-weekly basis. I met court staff, judges at all three levels, municipal officials, crown attorneys, members of the civil and criminal bars--literally hundreds of people all across Ontario who are part of our system and who make it work. At the same time I was getting to know the administration and program officials who have responsibilities in running the system and who are centered at Toronto.

I knew before I started (and I did not lack confirmation for it) that the system as a whole was severely stressed. I was told we were short of everything, that almost everybody was underpaid, that there were not enough judges, court reporters, translators, court rooms, administrators, justices of the

peace. It was nowhere asserted that there were not enough lawyers. I was told time and again that there were more cases, that they were getting longer and becoming more expensive for the client. It was also said with singular unanimity that more money would solve each of the identified problems.

I came to office with no "solution" for any of these perceived problems. What I did learn was that, although I had practised civil litigation for twenty-five years I did not know much about what the Ontario court system really looked like or how in fact it worked. If the court system and its administration in Ontario are like an iceberg, I started with a bare familiarity only with its peak, and little enough of that. My experience travelling across Ontario in that first year was, I believe, unique. My hope was that if I came to understand the system as it actually is, I would be able to separate fact from fiction, myth from reality, and thus on the basis of real, first hand knowledge a scheme, or at least a séries of solutions might appear.

It is important for me to record what I saw. The changes I propose must be measured and examined, not

in the abstract or as a "system" but rather against the real needs of judicial administration in the province.

The Province

Ontario is the second largest provincial land mass in Canada. It is twice as large as the four maritime provinces; it is more than twice as large as France and Spain taken together. In a practical sense the territory extends from Montreal in the east to Winnipeg on the west and from Windsor (almost as far south as California) to the northern mouth of James Bay.

Ontario has a population of almost 10 million. When immigration to Canada grows, half of the new immigrants come to live and work in Ontario. There is also consistently regular in-migration to the province from the Maritimes and western Canada. Our province, in a number of districts, is in fact bilingual. We are in addition among the most deeply multicultural communities in the western world. Ontario is no "melting pot"; it is a mosaic of cultural and often linguistic differences.

The population centre of Ontario (whether we like it or not) is Metropolitan Toronto, one of the great metropolitan districts of North America, with a population

of 3 million people. The city hub is surrounded by a "suburban" belt in the counties of Peel, York, Durham and Simcoe whose populations are consistently increasing by about 70,000 immigrants and in-migrants each year. Simcoe County is presently one of the fastest growing areas in all North America. There are, however, more than 800 other municipalities at least a dozen of which are relatively large--Ottawa, Hamilton, Sudbury, Thunder Bay, Kingston and others. These are not further suburbs. Each of these significant cities has a distinctive sense of community all its own; they are each to a remarkable degree independant of each other and the metropolitan core.

The province is divided arbitrarily into 49 counties or districts (the terms "county" and "district" are used here interchangeably throughout) each of which has its county or district "capital". The county lines are historic and appear to have no other current rational justification. The county "capitals" range from significant cities like Sault Ste. Marie or London to small towns like Cayuga or Gore Bay. In addition, Ontario has a remote north (northeast of Sudbury and northwest of Thunder Bay) which is not dissimilar to the Northwest Territories. Dozens of communities in this part of

Ontario, each unique, are accessible only by air in winter. Sometimes there is no other access.

The economic inventory of the province is extraordinary. Toronto is now the national financial and banking center of the country. The service industries that are a characteristic of the post World War era are quickly moving Toronto onto an international stage. The single largest business in the province is the automobile and related manufacturing industries but timber, mining and small manufacturing are sources of strength. Agriculture which a century ago would have been the dominant economic characteristic of Ontario has against this twentieth century backdrop, receded in financial importance.

Court Structure

The court structure imposed on the province is in substance the creation of Oliver Mowat whose landmark reforms in the 1880's unified the Chancery, Queen's Bench and Common Pleas "functional" divisions of the court into a single whole. While Mowat's court structure has been modified many times, what exists today is fundamentally his basic conception in substance unchanged.

The Court of Appeal is composed of sixteen judges and a variable number of supernumeraries chaired by the Chief Justice of Ontario. Its members reside in Toronto and it sits (except for occasional excursions to Kingston Penitentiary) exclusively at Toronto. Its membership has doubled in less than twenty years.

The Criminal and Civil Trial Division of the Ontario courts is divided hierarchically into three layers: The High Court of Justice, the District Court of Ontario and the Provincial Court of Ontario (made up of Criminal, Family and Civil Divisions).

The High Court of Justice is composed of forty-nine federally appointed trial judges and a variable number of supernumeraries who are required to reside at Toronto. In fact a small number of them have informally elected to live outside the city. It is presided over by a Chief Justice and Associate Chief Justice. The annual work of the court is divided into forty-nine roughly equal assignment lists which are then chosen by each judge on the basis of seniority. Approximately half the time of the judges is spent in Toronto with the balance spent travelling to and from, and sitting in one of the other forty-eight districts. There are permanent sittings in

London and Ottawa. In the last decade the work of four or five of these districts has become so great that the sittings of the court in that district are time consuming. Some districts are only visited once or twice a year.

The High Court judges also make up the Divisional court which is an ad hoc court created in 1970 to hear judicial review applications, some minor appeals and some procedural appeals. Most of this work is drawn either from the traditional agenda of Weekly Court or the Court of Appeal. While the Court is entitled to sit in Ottawa and London, most of its work wherever it may originate, is done at Toronto.

The procedural motion work of the court is done by the District Court judges who sit as Local Judge of the High Court in more than forty counties and districts. In Metropolitan Toronto, however, this work is done by twelve Masters and two Family Law Commissioners. They are supported by parallel staff in the city of Ottawa and one Master in each of London, Ottawa and Windsor.

The members of the Court are, and regard themselves, as generalists. A few members of the Court

have by informal designation developed specialties (criminal law, family law, bankruptcy and major commercial litigation).

While the court is for residential and practical purposes centered at Toronto, it is administered by a full staff (which it shares with the District Court) located in each county "capital". In each case the local administration is headed by a Sheriff and Registrar; in some instances these two offices are combined.

The judges of the court are appointed by the Federal Government; the Masters and Family Law Commissioners are appointed by the province; the Sheriffs and Registrars are appointed by the province. Historically the appointment of Sheriff and sometimes Registrar has been an appointment <u>to</u> rather than from <u>within</u> the administrative service. The balance of the Supreme Court staff are professional public servants hired pursuant to the Crown Employees Act or the Public Service Act,

<u>The District Court of Ontario</u> comprises 145 federally appointed judges. Its statute requires that no

less than one district judge will be assigned to reside at each county "capital". Judges' patents for more than a decade have referred to the appointees simply as members of the District Court of Ontario with the result that the places at which they reside and carry on their work is informally determined at the time of their appointment and is thereafter subject to the formally unconstrained direction from the Chief Judge. Most of them, however, reside outside of Toronto in the county "capitals" where they do much of their work.

The members of this court, like the Supreme Court of Ontario judges, are generalists; increasingly in the larger centers, however, there is some functional division between those who prefer to do criminal work and those who prefer to do civil or family work. In the last decade the Chief Judge has sought to achieve judicial flexibility by encouraging judges of the court to sit from time to time in centers other than their own.

The District Court is supported in forty-eight locations by an administrative staff that it shares with the judges of the Supreme Court of Ontario under the direction of the Sheriff and the Registrar. In

Metropolitan Toronto alone the District Court maintains a separate staff and separate offices under its own Registrar. Even there, however, it shares the services of the Sheriff.

Each judge of the District Court (unlike judges of the Supreme Court) performs his own motion work although assistance is provided by court staff with respect to assessment of costs and other matters suitable for determination by reference.

By statute the judges of the District Court are also members of a Small Claims Court. Indeed, until a decade ago every District Court Judge sat as the Small Claims Court judge. It is only in this decade that a system of deputy judges (invariably part time members of the Bar) and a partial civil system of full time judges was created.

Historically the District Court was a local court; it was not until 1962 that a Chief Judge for Ontario was appointed.

The Provincial Court of Ontario is composed of approximately 250 provincially appointed judges. Their patents do not refer to any division to which they are assigned and indeed each of them has, as a matter of statutory authority, equivalent power in criminal, family and civil matters. Following the "professionalization" of the Magistrates Court in the 1960's and the creation of a provincially appointed civil law judiciary in 1981, an informal functional division among criminal, family and civil law has arisen; it has been recognized by the fact that de facto and by informal arrangement persons are appointed to one branch or the other; each of the three branches is chaired by a Chief Judge.

At the present time there are 160 judges who are assigned to criminal law and 70 judges assigned to family law. These figures are approximate because of the "overlap" noted below.

The creation of a civil law division of the Provincial Court began as a pilot project in 1980. The full time judges of this division are eleven in number and are located only in Metropolitan Toronto, Hamilton, St. Catharines and Ottawa. The pilot project has not been extended to other parts of the province. The extension of

this "pilot project" across Ontario would probably require the appointment by the province of at least twenty new judges. While the District Court judges continue their statutory jurisdiction in the Provincial Court (Civil Division) much (and in some Districts all) of the work is done by deputy judges appointed from the legal profession on the recommendation of the District Judge.

For the most part judges of the Provincial Court (although their patents do not refer to this) are appointed informally to serve in a municipality or county. They may, however, be assigned elsewhere by their Chief Judge. A judge appointed to one division of the Provincial Court can only be assigned to another division with the concurrence of his own and the other court's Chief Judge. It is in this sense that the judges of the Provincial Court regard themselves as "specialized" judges. It should be noted, however, that there remain a few Provincial Court judges in Ontario who sit in more than one division.

The criminal and family divisions of the Provincial Court maintain their own administrative staff which is made up of public servants appointed under the

Public Service Act. By and large their offices are separate; they do not use the administrative services that are assigned to the Supreme or District Courts.

Court Buildings

Until very recently all court buildings were owned and maintained by the municipalities in which they were located. Beginning in the 1950's (as a result of the alleged impoverishment of municipal councils and on account of increasing demand for services) the province began the business of buying or renting these buildings from their municipal owners. More than half of these buildings are more than hundred years old; many are unsuited to their functions, and a significant number are in poor condition. They are extraordinarily difficult and expensive to refit or maintain. Nonetheless, they represent a kind of historic continuity in the communities in which they are located. There are times when this Attorney General feels like the Minister Responsible for the Heritage Act.

Generally speaking, the Supreme and District Court judges share these court buildings and interchangeably utilize the court rooms and other service facilities contained in them.

Shortly after the province began the business of acquiring or leasing court facilities from municipalities the professionalization of the Provincial Court began in earnest. It was decided by previous governments that to heighten the new role of the Provincial Court it should have separate premises; to this end, a number of provincial court buildings were constructed in Ontario. In the last decade as family law became a more "important" subject matter it was thought that separation of the family court rooms from the criminal court rooms was desirable. This led not only to a proliferation of court space, but meant that in many communities the Courts were found in two, sometimes three or four locations.

At the same time it was recognized that the Small Claims Court (later the Provincial Court, Civil Division) would work effectively only if its offices and courtrooms were found not only in the county capitals but in the smaller communities beyond. While this no doubt

enhanced access to the Provincial Court (Civil Division) it meant that in many cases where there was modest volume court offices were contained in the clerk's basement recreation room; in cases where Small Claims Court sat only weekly or bi-weekly, rented premises had to be acquired in small communities where often "suitable" space was simply unavailable.

In short the regional courthouse at Ottawa in which all courts sit on a regular basis and where all court services are centralized, is a happy anomaly. There are few districts in Ontario where services are similarly centralized.

Crown Attorneys

In the context of a paper about court structure and management, Crown Attorneys are important because they introduce a significant volume of work to the system.

Historically in Ontario a Crown Attorney was appointed for each of the 49 counties or districts in the province. Additional full time professional staff (Assistant Crown Attorneys) were appointed by the

Government of Ontario at the request of and on the recommendation of the County Crown Attorney as work volume required and provincial budgets permitted. Crown Attorneys thus appointed reside and perform work exclusively within the county or district to which they are appointed. At the direction of the Assistant Deputy Attorney General (Criminal Law) in Toronto they may be assigned as required to work outside their district. In respect of special cases or special needs the Criminal Law Division of the Ministry of the Attorney General is able to supplement Crown Attorney services from time to time as the counties or districts may require.

Drug prosecutions are conducted throughout Ontario by federal prosecutors by virtue of an assertion by the Government of Canada of a constitutional "pre-eminent right". Federal prosecution staff is, outside of Toronto, largely composed of per diem members of the private bar. This bifurcation of prosecutorial authority in criminal law matters makes development of Crown prosecution policy and practice difficult. The resulting problems are exacerbated by the increasing volume and length of drug trials.

The Courts Administration Division of the Ministry of the Attorney General

The Courts Administration Division of the Ministry of the Attorney General (reporting to the Assistant Deputy Attorney General (Courts Administration)) is responsible for providing all support services required by any of the three hierarchical layers of courts.

The Management Board of Cabinet annually provides a budget for this purpose which is administered by the Ministry so as to provide Crown Attorneys, court administrative staff, reporters, interpreters, provincial court judges and justices of the peace and so on as required, from district to district.

The provision of new physical facilities and major renovation or maintenance work is not the responsibility of the Ministry of the Attorney General or funded within its budget. This is rather the responsibility of the Government's landlord, the Ministry of Government Services. The Attorney General submits to Government Services his needs in any given fiscal year and the Ministry of Government Services adjudicates his claim

against the needs of other ministries for constructed or leased facilities. Government Services advances its own global budget in this respect to Management Board.

In 1985 the Courts Administration Division of the Ministry was divided on court lines: one section was in charge of providing support services to the Supreme and District Courts; another different section was responsible for providing similar services to the provincial courts (criminal and family divisions) and a third different section provided services to the Small Claims Courts or the Provincial Court (Civil Division). It thus followed that a provincial court (Criminal and Family Division) administrator summoned to a county town to assess its problems was in fact obliged to do so for budgetry purposes without regard to the resources or needs in the Supreme or District Courts, or the Small Claims Courts.

## Some Preliminary Conclusions

Any observer who had the time or opportunity to observe how the various parts of our court system actually worked would be able to draw (as I did) some preliminary conclusions.

1. Regionalism

Two of the courts (the Provincial Court and the District Court) are already effectively regionalized with respect to residence and work either on a county or municipal basis. The third court (the High Court) is not, although it provides services in each of the regions.

The regionalization of the District and Provincial Courts is not a function of the terms of the judges patent but is rather an informal arrangement upon which appointment is based; thereafter the judges' physical location is subject to the determination of the Chief Judge.

2. Specialization

One of the courts (the Provincial Court) is functionally specialized although the patents of its members do not recognize this fact. Functional specialization is achieved by an "understanding" prior to appointment

and the fact that following appointment the Chief Judge of each division controls assignment out of the specialized area.

A modest degree of specialization at the District and Supreme Court levels has begun to occur de facto in some larger communities (criminal, family, major commercial litigation).

3. Judicial Salaries and Benefits

The members of each of the three courts are paid salaries and benefits that are different. Although the salary differential between Supreme and District Courts is marginal, the difference between federally appointed and provincially appointed judges is still significant.

4. Judicial Work Conditions

The working milieu for each level of the court varies significantly. The Provincial

Courts handle very great volumes and operate in the least satisfactory physical circumstances. The Supreme Court judges handle the most modest volumes and operate by and large in the best physical circumstances. This leads to anomalies. In some communities the Supreme or District judge hears his case in a big empty courtroom; his provincial counterpart sits in a small crowded courtroom.

5. Concurrent Jurisdiction

Each court in the hierarchy discharges family, civil and criminal responsibilities. Pressures created by work load have led to expansion in the jurisdiction of the Provincial and District Courts. The result has been that each court in the hierarchy discharges an increasingly concurrent jurisdiction. The jurisdiction between the Supreme and District Courts is on the civil side almost identical. The jurisdiction in criminal and family law at the three levels is close to concurrent.

6. Workload Fluctuations

Each level of court experiences significant fluctuations of work load either on a subject matter or geographic basis. The quality of judges appointed in the District and Supreme Courts or in the Provincial Court (Criminal Division) or (Family Division) may locally affect the allocation of work between those three levels, one way or the other. The introduction of federal divorce legislation has increased the matrimonial work of the District Court and decreased the volume in the Provincial Court (Family Division). There are many other examples. As a result of staffing and work load pressures each of the federal courts has shown some propensity to encourage "reforms" that will push work further "down" in the system.

7. Work Load Sharing

The hierarchical divisions of the court do not encourage and perhaps do not permit one level of court to give assistance to

another in times of stress or work pressure. While judges appointed to the same level are enormously supportive of each other, in thirty years of practice I am not aware of any recorded instance where a Supreme Court judge assisted a District judge with his work load or where a District Court judge assisted a Provincial Court judge with his work load.

8. Judicial Complement

The number of judges in Ontario has more than doubled in twenty years. This is a disproportionate increase in relation to the size of the province. There is no sense that the appointment of more judges has been a solution to our problems in allocating work within the system. Indeed a case can be made that we were worse off in 1985 than we were twenty years ago.

## 9. The Judges' Real Role

Most judges upon appointment expect that it will be their principal job to hear and decide disputed cases. While that observation is correct it is a dangerous over-simplification. It overlooks a major fact. Almost eighty per cent of the criminal cases (numerically the greatest volume) in the Ontario judicial system are not tried; they are settled by a plea or a withdrawal. Almost ninety per cent of automobile negligence cases (numerically the greatest volume on the civil side) are settled. While judges are indeed appointed to hear and try cases a substantial portion of their work involves the management and processing of cases that are disposed of by agreement. When it is borne in mind that a significant number of cases are only settled on the eve of trial, the obligation to manage the case list, and thus achieve a settlement of the cases in a timely fashion, becomes obvious.

## 10. Judicial Case Loads

Over the last decade case loads in the Ontario courts (allowing for a marginal exception on the criminal law side) have not significantly increased: in short the number of cases entering the system is not much larger than it was. There is some evidence that more elaborate pre-trial process permitted by the new rules and the general complexity of modern life have made these cases, in the event that they are tried, longer.

## 11. An Historic Justification for a Hierarchy

One of the principal arguments for a hierarchical division of the trial courts has historically been that the two superior trial courts provided an appeal mechanism: some decisions of magistrates were appealed to District Court judges; and some District Court decisions were appealed to High Court judges. With the creation of the Divisional

Court the justification of the trial hierarchy as an appeal mechanism has largely though not entirely vanished.

12. Another Justification for a Hierarchy

A second rationalization of the hierarchical trial court structure depended on the recognition that some cases were "important" or "complex" as opposed to "simple" or "unimportant". This possible categorization of cases is no longer accepted as practical or fair by either the public or the Bar. The almost universal view that family law disputes were so "important" that they should all be determined by a unified court at the superior court level is proof enough of the change in attitude. In any event, it has been exceedingly difficult to establish a method to separate the "important" from the "unimportant", the "simple" from the "complex", without a complicated motions procedure (which adds expense and time to the process). An arbitrary determination

[dollar amount, nature of the case] does not seem acceptable.

13. Utilization of Facilities

The judicial hierarchy does not encourage the effective utilization of existing facilities including court rooms. It is not simply that a Provincial Court judge is uncomfortable using a Supreme or District court room (even when it is empty). It is more likely because without integration of court assignment and utilization lists it is difficult to predict when it will be empty. A visitor to almost any Ontario community of significant size will find both empty court rooms and court rooms bursting at the seams.

14. Realistic Trial Lists

In many Ontario court districts we have been unable to master the business of establishing real trial lists. Ideally a real trial list is one in which all the cases will go to trial. More often in fact

a trial list is one in which often as many as eighty per cent of the cases will be settled, withdrawn or adjourned. Unreal trial lists are a failure of predictability, a consequence of different court levels each setting their own lists, and in a pressured system a function of "double booking" by both the bar and judges.

The trouble with unreal trial lists is that it makes it impossible to utilize judicial time effectively. The cases either get settled in which case there is not enough work for the judge to do; or the cases do not get reached in which event they are further adjourned, thereby adding time and expense to the process. The short sitting hours of some Ontario judges is not a reflection of unwillingness to work; it is a reflection of our inability to organize the available work for them effectively.

15. Role of Chief Judge

The role of a Chief Judge in any of our courts lacks clarity. Some judges regard their independence from each other as important a judicial value as their institutional independence. In such a view the role of a Chief Judge is purely administrative and persuasive. A Chief Judge without effective power to set lists, assign cases or assign judges to cases and court locations as circumstances warrant is a Chief Judge with a role but without power to enforce it. The statutes do not speak clearly to this issue and there is not unanimity on the Bench about what is expected of or permitted to a Chief Judge.

16. Sheriffs, Registrars and Court Administrative Staff

The administration of court staff is centred at Toronto. The employees of each court office in each county are appointed under

the Public Service Act and have the status of civil servants. One of the normal benefits of civil service status is the opportunity to compete for promotions which are awarded on the basis of ability and experience. An exception to this principle exists in the Ontario system because historically sheriffs and registrars, the lead administrative figures in each district outside of Toronto, are appointed by Order-in-Council. I must quickly add that the present system has brought many distinguished, experienced and devoted people into court administration. Nonetheless, the present system does present problems. Order-in-Council appointments have tended to be made from outside the courts administration system. The consequence is that regular public service employees in the court offices feel "blocked" in respect of advancement with the damage to morale and dedication that this inevitably creates. As well, Order-in-Council appointees enter the system often without any particular knowledge of head

office requirements, the working of the system or the chain of command. They are often uncertain whether they are servants of the local judge or representatives of a centralized administration. This lack of experience in the system has caused the operation of courts administration to become overly dependent on the provision of "directions" from Toronto. In turn, this centralization has limited local officials' ability to effectively exercise their full administrative authority in a manner appropriate to the area or district being served.

17. The Diversity of Ontario's Regions

The administration of justice as a whole is confronted by different pressures from one part of the province to another. Factors such as population growth, lack of judicial resources, lack of physical resources vary from place to place. More personal factors such as the administrative abilities of senior judges or Crown Attorneys, the collegiality of the Bench, the impact of

personalities, the cohesiveness of the local bar and the size of the local bar committed to criminal work are variable across Ontario. As well public expectations of the system clearly vary from place to place. A criminal trial within three months may be appropriate local standard for the city of London, whose growth has been moderate and controlled; it would simply be an unworkable objective in Metropolitan Toronto. In short, the expectations and needs of the northwest are not the same as those of Metropolitan Toronto; the problems that confront the administration of justice in eastern Ontario are not the same as those that obtain in the southwest. It is unrealistic to expect that the solutions will be the same.

Who is Running the System?

Even if only a few of my preliminary conclusions are accepted they inevitably raise the question: Well then, who is running the system? The direct answer is

nobody. But behind the question is an erroneous assumption: There is no single "system". What there is, are four separate systems independent but interconnected. Each must work properly for the whole to work at all. The failure of one component more often than not pre-ordains the whole system to failure.

The four systems can be identified as: (1) The judges; (2) The Crown Attorneys; (3) The defence and civil bar; and (4) The administrators (Sheriffs, Registrars administrative staff).

It is important to recognize that each of these four systems has a role and independence that must be respected. The judges' independence which includes some critical administrative decision making (see R v. Valente) is constitutionally entrenched and an essential judicial value. The independence of the Crown Attorney to prosecute cases which in his opinion warrant prosecution is, subject to the stay power of the Attorney General, an important value of the common law. The independence of the private bar is a function of its duty to serve its clients. The independence of the administration, the representatives of the taxpayers in providing and managing resources in the system, is a fundamental tenet of responsible government.

The independent role of these four stakeholder groups is not a mere historic formality; it is essential to the way each group operates if its function is to be properly performed. Transgressions against the independence of each group are not merely ineffective; they are in terms of justice impermissible. For example, no one can tell a judge to spend five rather than three days on a trial, or to deliver up his reasons for judgment within a stipulated time, or to take on additional cases, or to sit in criminal rather than civil courts. These are all prerogatives of an independent judiciary which must be preserved. In the same way no judge or administrator can direct a crown attorney to reduce the number of cases of shop-lifting introduced into the system. Such charges are laid on the basis of sworn information by the police; the crown attorney's independent role in assessing and advancing those charges is in a certain way as inviolate as the prerogatives of the judiciary. In a similar sense the independence of the bar is a critical function which cannot be directed. In heavily burdened criminal courts the administration of the system would work much more effectively if the inevitable pleas of "guilty" in impaired driving cases were made earlier. But no defence counsel will be able to get authority to plead if a long

delay in the operation of the system is likely during which time the client will preserve his driver's licence. It might even be improper for him to attempt to do so.

The independence of each stakeholder therefore is not simply a constitutional value which must be protected; it represents a functional "reality" around which the administration of justice must be effectively managed.

My trips across Ontario have persuaded me that the most finely tuned "plan" devised by one of the four components of the system to run either its part of the system or the whole is doomed to failure if it lacks the co-operative support of the other three parts. There are countless examples. A judicial determination to add more criminal lists will fail to be effective if there are insufficient crown attorneys to handle the work or if the local defence bar is too small to accommodate the demand in a reasonable way; the establishment of a pre-trial system will not meet reasonable objectives if it does not take account of the needs and circumstances of the bar; an effort by the administration to maximize courtroom utilization will be unproductive if the various levels of the trial judiciary are not supportive; efforts to improve

disclosure between Crown and defence serve no purpose if co-ordinated judicial policies to require pleas at an early date are not in place; and so on. No one stakeholder acting alone can run the system; the system cannot be run effectively without the consultative co-operation of all.

There are thus four interconnected and independent systems which form the whole. But strangely, there has never been a mechanism in Ontario for assuring regular, consistent dialogue among the four groups of players, or any formal system for obtaining broad consensus as to how the administration of justice should operate. There is in short at present no way in which joint planning for the system's operation can be systematically undertaken in a setting in which all stakeholders participate. What we now know we face is not simply a short term pressure or a momentary failure of resources; we face a systemic failure.

It should be said that until recent times any effort to jointly plan the operation of the system co-operatively has been unnecessary. It is only in the last decade that pressures of population growth and its impact on our system has confronted us. The few tentative efforts at real consultation and co-operation have largely

failed. The Judges' Advisory Committee is, of course, simply composed of judges. The Provincial Bench and Bar Committee meets only sporadically, is burdened with a fluctuating and often unrepresentative membership and is not equipped in terms of time or resources to engage in any real planning.

But there is yet a more fundamental difficulty. Real consensus building (to say nothing of planning) among the four competing independent interests, is almost by definition an object of suspicion: the Crown Attorneys and the Bar fear co-option; the administrators fear the creation of a pressure group designed to extract tax dollars which they cannot provide, and judges fear that consulting with others about how the system works may in some fashion threaten their independence as judicial officers. It is no accident that the most persistent concerns about Bill 2 have centred not on merger, but rather on the role to be assigned to regional management advisory committees. It is only a slight exaggeration to assert that on all sides there is a deep seated paranoia about any such process. Co-operative planning and

consensus making among the four independent stakeholders that together form the administration of justice is not something that we are used to or are comfortable in attempting.

The Court Structural Reform Process

In June, 1986 as a result of widespread concern (that my own experiences had led me to share) about how our system operated, I appointed Mr. Justice Zuber of the Ontario Court of Appeal to conduct an inquiry. Mr. Justice Zuber was, in my opinion, ideally suited to this task. He had practiced law in a middle-sized Ontario city outside of Metropolitan Toronto; he had been a law teacher and later a trial judge in both the District and Supreme Courts before he was appointed to the Court of Appeal. He was "down to earth", full of common sense and most important had no preconceptions about what he would find or about what he might report.

The Zuber Commission received hundreds of briefs from all across Ontario. The judge himself visited every part of the province, and places beyond, speaking to judges, lawyers, administrators, consumers and opinion leaders. [His inquiry was not the first such effort. In 1976 the Ontario Law Reform Commission had issued a massive report much of which was devoted to court structure and organization.] Nonetheless, Mr. Justice Zuber's report issued in July, 1987 and containing 159 recommendations was a monumental contemporary effort to assess the nature of our problems afresh. The citizens of Ontario interested in the administration of justice owe him a very great debt.

Following the release of Mr. Justice Zuber's report I personally consulted with dozens of individuals and groups drawn from the Bench, Bar and the community. Although time consuming, I met with everybody who had expressed any interest in giving me the benefit of their views.

In June, 1988 I convened at Toronto a National Access to Justice Conference which brought together, from

all across the country, participants in the system including judges, members of the Bar, academics and consumers. Structural change and system management were at the forefront among the subjects canvassed. It was fascinating and useful to see a wide range of participants, some inside the system, some outside, facing each other to discuss these matters (often for the first time together) in large and small sessions.

In August, 1988 I formed within the Ministry a Court Reform Task Force chaired by Jack Johnson, the Assistant Deputy Attorney General (Civil Law). The Task Force prepared a short paper designed to outline the options examined by Mr. Justice Zuber and others. The paper was provided to every group or individual that expressed an interest in being consulted again; Mr. Johnson and his colleagues over six months obtained the views of all who were prepared to express themselves about the issues.

Following that, Government policy decisions were made and the two pieces of enacting legislation now known as Bills 2 and 3 were approved by the Executive Council and introduced in the Legislature of Ontario on May 1, 1989.

Only in Ontario could an analytical and consultative process that began in 1972 with the announcement of the Law Reform Commission Study and which ended sixteen years later with the introduction of legislation be called a "rush to judgment". Nonetheless, that is how the Canadian Lawyer chose to describe the exercise.

Why is Court Structural Reform Important?

Some well meaning critics of the Government proposals say that our efforts and energy are misdirected and that the examination of structure is a triviality compared to substantive law reform, the need for new dollars in the system, rule changes, the modernization of the court house system, and so on.

This view requires an answer. I believe that structural changes in fact underpin all the other reforms and changes that we hope to make; it is indeed the essential precondition for the establishment and maintenance of a judicial system in the province that will work effectively well into the next century.

I believe there are a number of reasons to support my view. We are not presently managing the system effectively. This is nobody's fault. It is simply that the structures upon which the system is built are in an era of increasing pressures either inappropriate or unworkable. The present structures inhibit, if they do not actually prevent effective co-operative management. As previously discussed, the four independent components of the system, inevitably more often than not, have differing legitimate interests and thus often work at cross purposes. The lines of management responsibility are unclear if they exist at all. The result is that the utilization of all the resources provided to run the system (including judges, administrators and physical facilities) is, notwithstanding the best intentions, uncoordinated, haphazard and often accidential.

Lack of co-operative management and planning of the system which I believe in large measure to be a function of our existing structures has a number of important consequences. First, it damages public confidence in the things the system is suppose to do. This failure of public confidence is widespread and

increasing. There may have been a time when a system designed on the same principle as a maze was regarded by the public as exotic, mysterious or glamorous; in the late twentieth century any such system is in fact regarded by the public as bizarre, inhuman and unresponsive to community needs.

Second, lack of co-operative planning and management creates more than a difficulty of public perception; it in fact reduces in real life terms our capacity to do what we want to do, namely, try, settle or otherwise dispose of litigation quickly, economically and fairly. The perceptual failure masks a real failure.

Third, if we cannot design and manage a system that effectively utilizes the resources that the taxpayer now assigns to its use, we cannot reasonably expect that additional resources will be provided in the future. We live in a decade when taxes are very high and the demands placed upon the taxpayer are very great. We must compete for scarce tax dollars with the demands of health care, education, social services, community government and a host of other legitimate and serious needs. If we cannot demonstrate efficient utilization of what is provided it

would be in the taxpayer's view simply imprudent and wasteful to provide more. Our system in relation to any other community system, has no "right" to tax dollars. It will obtain them only if it can demonstrate appropriate utilization of current funding and the benefits that will be achieved by additional funding. With the existing structures in place the case for "more" is difficult to make. The administration of justice is not being asked to confront a special hurdle; instead, increasingly, our system is being asked to meet in a general way the same kind of cost-benefit analysis which health, education and other community social services have faced for a decade.

Fourth, the existing system itself is profoundly demoralizing for many people who work within it. A structure which is designed to emphasize differences in "quality" will not always attract one's best effort. The use of distinguishing forms of address, the associated distinguishing paraphernalia, the distinction between "superior" and "inferior" courts, is not a system designed to draw the best from those who work within it. When the resources of the system are shared unequally the situation just gets worse.

## The Vision of the Future

In a statement to the Legislature preceding the introduction of Bills 2 and 3 I set out the Government's vision of the future as a result of the elaborate consultation process in which we had been engaged. It has three essential features: a regional system; a single trial court; and co-operative and consultative management.

## A Regional System

For the reasons set out above including the size and population of the province, the system can no longer be centralized at Toronto. It simply does not work any more. It thus follows that our first goal, a central part of the short and long term vision, is to move the administration and management of the justice system out of Toronto into the eight regions of the province. These regions (with a modification in northern Ontario) were identified by Mr. Justice Zuber in his Report. With the exception of Metropolitan Toronto the regions are roughly the same size and exhibit a measure of geographic viability. The boundaries of the regions will be fixed by regulation so they can be adjusted from time to time as changing demographics may require.

It has already been noted that two of the trial courts though administratively centralized at Toronto are regionalized de facto. We contemplate that in the future all judges of the trial court will be appointed to reside and serve in one of the regions. As well Crown Attorneys and senior administrators will be assigned to and will work within a region. We expect that inevitably the organization of the Bar will as well effect this regional focus.

The regional judiciary will be chaired by a Regional Senior Judge who will assume a time limited appointment. He will be vested with the major administrative responsibilities for the judiciary within his region. He will serve under an Ontario Chief Judge with province wide responsibilities. The Regional Senior Judge will work together with the Chief Administrator of the region, the regional Crown Attorney and representatives of the regional Bar to plan for and respond to the needs of the various communities within the region.

It is important to emphasize that regionalization does not contemplate or require that any court office be closed or that any courtroom location be changed. We do not intend to replace a system that is centralized in Toronto by creating a region that, for example, would be centralized in Ottawa. Circuits within the region will be devised; the Chief Judge and his judicial colleagues will have ample flexibility to assure judicial resources are assigned across the region as required from day to day.

A regional scheme does not dictate that judges will be without an opportunity to serve in other regions of the province from time to time. Indeed it seems to me self-evident and desirable objective that, subject to consultation with the various regional senior judges, this should be within limits encouraged. It already happens to some extent in the District Court and it would be contrary to experience and wise utilization of resources if it did not continue to happen from time to time under a regional system.

A regional system, I believe, will over time "spin off" other benefits especially as regional

management begins to take hold. Local people with local knowledge will, more often than not, have an accurate assessment of needs, a full understanding of local expectations and will be quick to sense and understand local problems. This will enable a regional system to respond quickly, make requisite adjustments fairly and develop and monitor proposals for the most efficient and cost effective utilization of scarce human and physical resources. Let me take a small example. Criminal courts are conducted at both Perth and Smith Falls, some twelve miles apart. This may be necessary and prudent. It may not. Decision makers in the region are better equipped to make a judgment that is truly responsive to local needs and consistent with good management than the best intentioned people in Toronto head office.

A Single Trial Court

The three trial court levels that presently exist in Ontario have at least one characteristic in common: they all conduct civil and criminal trials under substantially the same rules of procedure and evidence. With the exception of the Divisional Court, none of the three levels does any significant amount of appeal work for the others.

The hierarchy that defines and separates these three court levels is demoralizing for many and is clearly inefficient. If proof of this be required one only has to examine the efficiencies achieved by merger of the two superior courts in seven Canadian provinces. It is unlikely that the collapse of three levels into one will be much different in result, especially bearing in mind the increasing concurrency of jurisdiction.

Why then should there not be a single trial court in which each judge appointed has equivalent power and jurisdiction to decide any kind of trial case to which he or she may be assigned? There are, of course, obstacles. While the hierarchy is demoralizing to some, it is a comforting sign of excellence to others. But the enhancement of the capacity of some judges does not require the diminishment of existing capacity in others.

I believe that a regional court of judges of equivalent power will develop a sense of collegiality within the region that is increasingly impossible under the present Toronto-centered design. Appointment and assignment of judges will continue as it already does (especially in the High Court of Justice) to reflect the

interest of the appointees and a functional division of the work into criminal, civil and family areas will inevitably develop. There is no secret that some Supreme Court judges hear most of the significant criminal work in that court and that others hear none. This is an administrative arrangement made by the judges themselves to reflect their own interests and abilities; there can be no reason to believe that it will not continue.

It has been said that a "quality" court will be submerged. This has not been the experience with respect to superior court merger in the other provinces. Even if it was, what do we mean when we say to the public that we have established a "quality" court that hears only five per cent of the cases tried in the province? I am confident that a single trial court operating on a regional basis will in fact greatly enhance the calibre of appointments across the system and the ability of all judges in the region to perform their work efficiently and co-operatively with an appropriate level of collegiality *inter se*.

Co-operative Management of the System on a Regional Basis

This is a critical feature of our vision of the future. We contemplate that a regional committee will be established within each region that will be representative of the four independent stakeholders whose joint co-operative effort is required within their independent realms to effectively manage the system: the judges, the administrators, the Crown Attorneys and the Bar.

There are a number of forms such management committees can take. They can be very large to reflect the diversity of a region and meet say quarterly; they can have an executive committee smaller in size which might meet daily or weekly.

There are, in my opinion, only three essential conditions for success. First, it must be recognized that the committee is a group of independent actors each with their own exclusive responsibilities and each participating in the co-operative management exercise without any derogation of independence on any side. In this sense I believe that equal representation from the four stakeholder groups, and a rotating chairmanship, is symbolically and practically the most effective model.

Second, the committee must commit itself to co-operatively plan, and with full consultation, manage the system within its region. It will not only be committed to long term planning for the needs of the region but will be expected to make the daily or weekly adjustments that will be required from time to time to see that the system as a whole is effectively utilized and the work of the court efficiently advanced.

Third, the committee must not be perceived as imposing any constraint or restriction on the judges, the crowns, the administrators or the Bar. I do not see the committee working, and indeed it will not work, if it is simply an attempt to "gang up" on the administrator to obtain more resources or to "gang up" on the judge to make particular judicial assignments. It should be a forum in which each will express their concerns about the needs of the administration of justice in the region, and insofar as they are able, or think wise, make the adjustments and develop the policies which will work well. This system works in other parts of the world and there is no reason why, with adjustments that experience will dictate, it cannot work in Ontario. We have simply never tried it before.

Phasing the Vision

Fundamental structural change cannot occur overnight. It is for this reason that the government decided that the effort should be undertaken in two phases. Phase I is represented by Bills 2 and 3 and the administrative changes that have already been undertaken in support of those bills. Phase II has been announced in general terms. Planning for it has begun but no legislation has been drafted and no start date established.

Phase I, which is effected by Bills 2 and 3 and certain concurrent management changes, contemplates the collapsing of the three-tiered hierarchical system into a two-tier system by merger of the Supreme and District Courts. There is nothing novel about this proposition; it is a stage that has been completed in seven Canadian provinces and is presently underway in British Columbia. As well, Phase I contemplates the regionalization of the judiciary, the administration and the crown attorney system.

Phase I as well foretells Phase II by the creation of a single trial court, the Ontario Court of Justice, which comprises a two-tier system: the newly

merged General Division (section 96 judges) and the Provincial Division (provincially appointed judges).

The Provincial Court (Family Division) and the Provincial Court (Criminal Division) are merged into the Provincial Division of the Ontario Court of Justice. As I have noted, under the current system the patents of the Provincial Court (Criminal Division) and the Provincial Court (Family Division) make no reference to their specialized function although they each have a Chief Judge. Merger into the Ontario Court of Justice Provincial Division is in that sense a formalism except that under the plan there will be one Chief Judge.

Phase I also terminates the pilot project commenced in 1980 in which a full time professional Provincial Court (Civil Division) was established primarily in Metropolitan Toronto. The bill assigns civil jurisdiction in small claims matters to the Ontario Court of Justice (General Division), thus restoring the situation which existed before 1981. The result, coupled with merger (with a single modification noted below), is to create a single trial court for all civil matters.

The "Small Claims Court" rules developed by the Provincial Court (Civil Division) will apply in all cases under $5,000. These cases will continue to be tried in the communities in which "small claims courts" are presently situate. Part-time appointees will hear cases up to a $3,000 limit. Superior court judges will hear cases between $3,000 and $5,000 (as the District Court judges do now). As well, the Government has invited the Rules Committee to prepare special rules modelled on the existing small claims court rules for the adjudication in the General Division of cases between $5,000 and $15,000.

The system of Masters and Family Law Commissioners will not be continued. As has been noted above, these judicial support systems are largely centred on the Toronto region and provide support only to the Supreme Court of Ontario. In fact, across Ontario motions work for the Supreme Court of Ontario has historically been performed by District Court judges who also do the motions work of their own court. To replicate a Master or Family Law Commissioner system across Ontario would be very demanding of resources, and indeed, bearing in mind the way the work is now being performed throughout most of the province, would be unnecessary. As well, strong views were expressed to the Ministry by those who made

submissions that all steps in a case, including motions, particularly insofar as they are important or dispositive of rights, should be determined by judges.

In Phase I the regional nature of the new system is identified and advanced by the appointment of two regional senior judges (one for each tier of the Ontario Court of Justice) in the eight regions of Ontario. It parallels the appointment of regional court administrators, regional crown attorneys and the establishment of regional court management advisory committees which will include representatives of the regional bar.

When Phase I is accomplished, Phase II will be both <u>easier</u> and <u>more difficult</u> to achieve. It will be <u>easier</u> because all parts of the regional system will be in place and working; Phase II will simply entail the amalgamation of the two remaining hierarchical divisions of the Ontario Court of Justice into a single trial court. It will be <u>more difficult</u> because this ultimate merger raises important questions of constitutional authority, the appointment process and other issues which are discussed below.

What Has Been Accomplished So Far

1. Bills 2 and 3 will receive third reading and Royal Assent imminently. Our goal is to implement its provisions by January 1, 1990.

   The Government of Canada has indicated its approval in principle of the scheme incorporated in Bill 2. I have been advised that the necessary federal legislation will be introduced and passed by Parliament before January 1, 1990.

2. A broadly based Implementation Advisory Committee composed of judges from each court level, administrators, the crown attorneys and the bar was established in late June, 1989 to oversee the introduction of the new system and to identify and resolve problems that need to be addressed. The chairmanship of this Implementation Committee has rotated among the various participants.

3. The judges of the High Court of Justice and the District Court have recently established their own Implementation Committee to deal with integration problems that especially touch on the judicial prerogative and judicial independence. I am advised that this committee is making significant progress with respect to such judicial prerogative questions as the assignment of judges, the composition of the Divisional Court and like matters.

4. The eight Regional Senior Judges in the General Division will be appointed by the Attorney General of Canada. I anticipate that these appointments will be made shortly. I am advised that the Attorney General has constitutional reservations about his capacity to make a time-limited appointment and he is not presently prepared to do so. The Judges' Implementation Committee, however, appears to be of the view that de facto these appointments should be time limited. It is hoped that encouragement toward

this objective will be obtained by a resolution of the bench that each appointee should be invited to treat his appointment as time limited. In addition, both current and proposed federal and provincial legislation, provide that a Chief Judge and Regional Senior Judges after five years in office can move from their administrative position and assume the duties of a sitting judge.

5. The eight Regional Senior Judges of the Provincial Division will shortly be appointed. There is no constitutional impediment to time limited appointments in respect of these regional senior judges. They will therefore be appointed for five years with a possible extension to seven. They will not be eligible for re-appointment.

6. The new Chief Justice of the Ontario Court of Justice (General Division) will, we expect, be Chief Justice Frank Callaghan. At the request of the federal government the statute contemplates the appointment of an Associate

Chief Justice of the Ontario Court. The integrated bench is apparently divided about whether such an appointment is necessary at the present time. Whether an appointment is in fact made is within the exclusive prerogative of the Prime Minister of Canada. The statutes does not contemplate the appointment of an Associate Chief Judge of the Provincial Division.

7. The Ministry of the Attorney General in the late spring appointed eight Regional Directors of Courts Administration who are now in place. They are in charge of the administration and staffing of each of the regions; sheriffs, registrars and court managers will report to them. At the same time steps have been taken to de-politicize the appointment of sheriffs and registrars who henceforth will not be Order-in-Council appointments but will be public service appointments. We hope that one benefit of this system is that court administration in Ontario will become a sophisticated and fulfilling career which will attract into it the best professional capacity in the province.

8. In the late spring Regional Crown Attorneys were appointed for each region to whom the crown attorneys and assistant crown attorneys in the counties and districts will report. The duties of the Regional Crown Attorney are in large measure administrative. It will be the Regional Crown Attorney's function to assure that the work load across the region is effectively administered and that professional resources are in place in each community as needed to meet the demand. As well, steps have been taken to alleviate the chronic under-staffing and under-funding that has for almost a decade had debilitating effect on the critical role that Crown Attorneys play in our system. Over the last few years the number of Crown Attorneys in Ontario has been increased to the current complement of 372. Following the receipt of the Weiler Report a new compensation plan was devised for Crown staff which permits compulsory arbitration of compensation levels. These are very important changes, long overdue and designed to ensure that the Crown law staff can continue to play the effective and important role in our system that Canadians expect.

9. It is hoped that Regional Courts Management Advisory Committees will be appointed before the end of the year. A significant number of these appointments will in effect be ex officio (the Regional Senior Judges, the Regional Administrator, the Regional Crown Attorney). The appointment of members of the bar to serve on the Regional Courts Management Advisory Committee is critical for the reasons I have set out above. A special challenge is presented because the appointees will be expected to represent their region as a whole. The present organization of the bar is on a county or district basis. It is anticipated that for full effectiveness the county and district associations within a region will begin to work together in order to assure appropriate appointments to represent their collective interest.

10. The new system for the determination of "small claims" is being developed with the assistance of the Implementation Advisory Committee. What is contemplated is that the small claims court office in each community now served will

continue to exist, although in the case of very small offices staffing assistance will be provided by the superior court.

The "small claims" limit will be increased to $5,000 across the province. General Division judges will try cases above $3,000 which are, of course, now within the jurisdiction of the District Court. Part-time judges who historically have made an important contribution to the effectiveness of the system will try cases under $3,000. All cases will continue to be tried in the community courtrooms that now serve the Provincial Court (Civil Division).

Five Other Initiatives

There are five other initiatives undertaken in the last three years which while not directly related to our court reform proposals will nonetheless have a significant impact upon and are designed to advance them: the Courthouse Construction and Renovation Program; the Provincial Court (Criminal Division) Delay Reduction

Program; Civil Case Management; the Judicial Appointments Advisory Committee; the Provincial Judges Compensation Scheme.

The Courthouse Construction and Renovation Program

Historically in Ontario the construction and renovation of courthouses has been the result of ad hoc Ministry decisions. In 1985 there was no program or scheme in place designed to deal with this important question in a systematic or orderly way. Decisions appeared to be taken as a result of local pressures and often without regard to competing needs across the system as a whole. In 1987 I announced a new approach. The Ministry undertook to conduct an in-depth analysis of the resources, short and long term needs and future demographics of all counties and districts in Ontario (except St. Catharines and Ottawa which already had opened new integrated courthouse buildings). These detailed reports on and analysis of each county and district were circulated to representatives of the Bench, Bar, Crown Attorney staff, police, municipal officials and others in each county with a request for additions, comment or criticism. As a result of significant input thus obtained from these local sources a needs assessment was prepared.

On the basis of the needs assessment (and the public process which had supported it), the Government developed and announced a five year program for courthouse renovation which numerically ranked the ten projects which it proposed to commence within a five year time frame. We also announced a list (not numerically ranked) of ten further projects which were likely candidates (although not an exclusive list of candidates) for a subsequent five year program. I am happy to report that the Ministry and Government Services are on track with respect to the first five year program.

The importance of this program is that it represents a local and publicly assisted evaluation of our needs; it removes the spectre of political interference in the allocation of construction and renovation projects; it allows the users in each county and district to see how its needs have been measured against the needs of other users across the province. As well, as you might expect, our reliance on public and professional input in the process has been critical in assuring that all relevant information is at hand when decisions are made.

The program also established a series of standards that would be applied in Ontario in respect of courthouse construction, renovation and utilization.

These standards represent fundamental change in respect of courthouse construction programs in Ontario and are closely connected with our long term vision about the structure of the court system.

The Criminal Court Delay Reduction Program

Provincial Court criminal case loads have caused particularly significant problems in six counties or districts which have been subject for over a decade to extraordinarily high population growth. These districts are the counties of Peel, Durham, Simcoe, York Region, Scarborough (all suburban communities either within or near Metropolitan Toronto) and Ottawa-Carleton. In 1988 Chief Judge Hayes and I requested the Senior Provincial Court Criminal Judge in each district to work with us to establish a Delay Reduction Committee to address the local problem through an examination of the utilization of resources in the community. These committees are composed of representatives of the Bench, the administration, Crown Attorneys and defence Bar. Often representatives of Legal Aid and the police participate as well. Their mandate as a committee is to work in a consultative and co-operative

way to determine the effectiveness of the criminal process in their communities, to plan for the process, to develop ways in which the process might work more effectively or the resources which support it might be used more effectively. In recognition of this effort I pledged that available resources would be applied first in those communities which had developed co-operative Delay Reduction Programs, had agreed on practical plans and had worked them as effectively as possible.

Although the experience is a novel one in Ontario, I am happy to report that the Delay Reduction Program has reported some significant successes. In Ottawa-Carleton, for example, under the leadership of Senior Judge Belanger and his committee, delay times were reduced from fourteen to ten months over a six month period without the introduction of significant new resources. When the system has been analyzed, a plan devised and is working as effectively as it can, I have played my part by making new resources available. For example, in Ottawa-Carleton the complement of the Bench has been increased by two judges and the complement of the Crown Attorney staff has been increased by three new staff. In a co-operative and consultative way plans

have also been developed and worked in Scarborough, Durham, Peel, Simcoe and York Region and the Government has provided new resources to support the community developed plans in those communities.

While the Delay Reduction Committees have addressed a particular problem in the Provincial Court (Criminal) system, I refer to them here because they provide an interesting prototype for the work of the Regional Courts Management Advisory Committees that is contemplated by Bill 2. Those who have fears about the capacity of such committees to work well, or or those who imagine the prospect that the committee system may trench upon fundamental independance have only to look at the reality as exhibited in Ontario in the last year by the Delay Reduction Committee system.

Civil Case Management

The case management project is an initiative of the organized bar to which the Ministry of the Attorney has given financial and moral support. It seeks to introduce, in an experimental way, the principles of case management which have been developed in American

jurisdictions. These principles essentially require a non-traditional intervention in the way the judicial process moves from the commencement of a civil case to its conclusion. While case management can involve a wide variety of strategies, it essentially requires our judges to play a part in determining the pace of litigation as it moves to trial, a function which heretofore was more or less exclusively a responsibility of the Bar.

The Bar has established three pilot projects at Sault Ste. Marie, Windsor and Metropolitan Toronto. The committees supporting each project have been broadly based and in each of them all the players in the system including the Bench and the Bar have worked together co-operatively to develop a new process and where necessary new rules to support that process. The new rules to support case management in Windsor are already before the Rules Committee and the Windsor and Sault Ste. Marie projects are expected to commence operation early in 1990.

The difficulties in implementing civil case management are considerable and the benefits will have to be carefully assessed. The good news is that once again this represents an initiative in which local

representatives of the judicial system work together to respond to local needs in the light of local expectations and circumstances. There will, of course, be some people who are traumatized at the prospect that there will be local civil practice rules for the conduct of cases in the city of Windsor and the County of Essex. This Attorney General is not one of them.

The Judicial Appointments Advisory Committee

The desirability of establishing a system of appointing judges that would be and would appear to be without political interference has long been on the public agenda. It presents an important issue not only because the risk of political interference is real, but because the credibility of our process requires a public demonstration that the best available men and women are appointed to the Bench. A truly independent process has one other advantage: if political appointments are truly removed from the political realm it seems less likely that the various levels of government will be as profoundly concerned about whether the appointments are formally made by the federal or provincial power. In short, the extent to which political responsibility is removed is the extent to which concerns about respective powers of appointment under section 96 of the Constitution Act will be eased.

In 1988 I appointed the Judicial Appointments Advisory Committee. It is chaired by Professor Peter Russell of the University of Toronto and is composed of six laymen, one sitting Provincial Judge, one lawyer nominated by me and one lawyer nominated by the Law Society of Upper Canada. The new system works in this way. The committee is advised by the Chief Judge that a vacancy exists, the functional division of the court (family, civil or criminal) in which the vacancy occurs and the community in which the successful applicant will be expected (subject to the discretion of the Chief Judge) to serve. The committee advertises the vacancies and seeks applicants. A detailed application form has been prepared. The committee determines the extent to which it will conduct personal interviews after conducting an informal consultation process in the community in which the successful applicant lives and where he or she will serve. Following its interview process, the committee then provides to me a numerically ordered "short list" of qualified applicants from which the appointment is made. My nominee is then presented in the usual way to the Judicial Council before Order-in-Council appointment is made.

This is an innovative process in Canada and so far appears to be working to a high degree of satisfaction. The new judges in Ottawa-Carleton were appointed in this way. I believe that the adoption of a similar scheme by the Government of Canada would significantly ease concerns that exist about any realignment of appointment responsibilities under the Constitution that may be required by Phase II.

The Provincial Judges' Compensation Scheme

Disputes about the appropriate level of compensation and benefits for Provincial Court Judges, and more importantlt about the process by which those determinations are made have been on the provincial agenda since the late 1970's. Following the Government's refusal to accept a recommendation made in 1985 the Provincial Court Judges' Association and the Government met, negotiated and entered into a new scheme which is intended to be implemented by legislation. The scheme contemplates a tripartite tribunal which will meet every two years to make recommendations to the Government with respect to remuneration and benefit levels. The recommendations of the tribunal are submitted to the Chairman of the Management Board who tables them in the Legislative Assembly. These are then referred to the Standing

Committee on the Administration of Justice. The Government is free to make its determination irrespective of the conclusions of the tribunal or the Standing Committee. The Government's decision as to remuneration and benefits is incorporated in legislation and is imposed as a charge on the Consolidated Revenue Fund. The provincial model essentially tracks the model developed by the federal government for the determination of remuneration and benefits for section 96 judges.

The first tribunal chaired by Gordon Henderson, Esq., has made its recommendations with respect to salary and certain other matters. While the government has not yet responded to all of the recommendations, the remuneration of provincial court judges has, as a result of the Henderson report, been increased by about twenty per cent in one year to a level of $105,000.00 per annum, the highest Provincial Court compensation in Canada.

The Challenges of Phase II

As I have noted above, when Phase I is completed and fully operational, the challenges presented by Phase II are in one sense relatively simple: what is contemplated is the creation of a single trial court by

the functional merger of the General Division and the Provincial Division of the Ontario Court of Justice into a single rank of equivalent authority and power.

As a result of the changes incorporated in Phase I the civil jurisdiction of the various courts is already assigned to a single trial court, the Ontario Court of Justice (General Division). Phase II will extend and complete this process by assuring that criminal and family law matters are within the jurisdiction of a single court.

Family Law Unification

There was virtually universal support among all those who made submissions to the Zuber Commission and to the Ministry that all family law matters should be tried by a single court. As early as 1974 the Law Reform Commission of Canada had recommended the creation of unified family courts in order to remove jurisdictional anomalies in family law. The Unified Family Court project in Hamilton and similar projects in other provinces have left no doubt that the public interest is best served by a single family court that has plenary jurisdiction. Although the same unanimity was not apparent, a

significant majority of those making representations believed that unification in the event that there was no merger should occur at the Supreme Court level. Constitutional difficulties made unification at the Provincial Court level highly problematic. Province wide family law unification has already taken place in both Prince Edward Island and New Brunswick at the Superior Court level.

Criminal Law Unification

The unification of the criminal courts in a single division is more contentious and for some, a more novel concept. It should be noted, however, that the question of criminal court unification has been discussed in Ontario and elsewhere for almost two decades. In the late 1960's Professor Martin Friedland's report on the Magistrate's Court made such a proposal. So in 1969 did the Ouimet Committee. Similar recommendations are contained in Professor Peter Russell's more recent text, The Judiciary in Canada. Submissions in support of the proposition were made both to Mr. Justice Zuber and to me.

In England the Crown Court, although it lacks formal unification, amounts to a functional unification on the criminal side. A number of states in the United States undertaking a reform recommended by a Presidential Commission on Justice have implemented criminal court unification. In addition the recent working paper of the Canada Law Reform Commission recommends a single court for all criminal cases.

Whatever its merits in the abstract, it seems to me difficult to contemplate civil and family court unification without addressing the question of criminal court unification. To do so would be to permit the continuance of a limited jurisdiction "rump" court with the problems of morale that would inevitably arise. In addition, it is difficult to develop a rationalization for such a model that the public would understand and which would be consistent with our general recognition of the primacy of criminal law because of its impact on personal freedom and security.

There are those who assert that because of the virtually unanimous support for it, family court

unification should have been implemented as part of Phase I. Indeed, Opposition Members of the Legislature proposed amendments to Bill 2 which, if accepted, would have achieved this result. To accept those recommenda- tions would, as I have said, leave the Provincial Court (Criminal Division) as a "rump" court. It was also the Government's view that in the practical order merger presented sufficiently difficult challenges to our Superior Court judges without the additional administrative stresses that would inevitably have occurred if "merger" included the seventy members of the Provincial Court (Family Division) or, even more alarming, the appointment of seventy new federal judges.

The practical problem associated with the implementation of Phase II is that it requires every judge to have a federal patent. How is this to be achieved? Leaving aside an amendment to section 96 of the Constitution Act (which could not even be considered until the province of Quebec takes its place at the constitutional table) there are at least three ways. First, the federal government might agree to grant its patent to criminal and family law appointees chosen by the province. This method of "joint" appointment already

exists informally in respect of the Bench in the Hamilton Unified Family Court. It works well. Whether it would work as effectively on a province wide basis is a matter of conjecture. Second, the federal government might agree that a proportion of the unified court judges appointed in the province of Ontario by federal patent should be nominated by the province to reflect the divided authority to appoint presently contained in the Constitution Act. This is the model proposed by the Law Reform Commission of Canada. Its virtue is that it simply reflects the continuing reality of the divided appointment process while permitting a unified jurisdiction to exist. Third, the province of Ontario might be prepared to consider permitting all appointments to Ontario courts to be nominated and made by federal patent. There are a number of conditions which would attach to this third proposal. The pre-eminent condition is that a truly effective appointment process should be developed to provide the maximum assurance that there will be no opportunity to permit appointments to reflect political considerations and that the highest quality candidates in criminal and family law are identified.

An underlying difficulty with respect to any of the three options is the question of cost. The judges of a single trial court must receive the same remuneration and benefits. Although remuneration for provincial court judges in Ontario is at the highest level in Canada and a formal process now exists for its improvement, there is still a significant gap. It is worth noting, however, that in any merger or unification the evidence is almost conclusive that fewer judges are required to dispose of the same volume of work. I am confident that a case can be made that, assuming parity in salaries, the total cost to the federal and provincial Treasuries need not be significantly greater than it is now. Although the federal-provincial discussions will not be easy, I am confident that the issue can be bridged.

On the criminal side, a single trial court presents some technical questions arising from the provisions of the Criminal Code. As I have noted above, jurisdiction in criminal work between the Provincial and the Superior Courts is increasingly concurrent. The two notable exceptions relate to the unique capacity of a superior court to conduct trials with a jury, and the

provision that before trial with or without a jury, a preliminary inquiry is optional in the Provincial Court (Criminal Division).

The need for jury trials presents no obstacle for a single trial court. Neither should the requirement of an optional preliminary inquiry. Under the present law in a significant number of cases, an accused person is entitled to be tried by a Provincial Judge (Criminal Division), a Superior Court Judge alone or a Superior Court Judge and a jury. A preliminary inquiry can precede either option. There are in fact a significant number of cases in which, following or during a preliminary inquiry, accused persons re-elect to be tried by a Provincial Judge. There is no reason of principle why the same options should not be available in a single trial court. The issues confronting a preliminary inquiry judge and a trial judge in a criminal case are essentially different. Those who assert that the issue before a preliminary inquiry judge at the conclusion of the evidence and the issue before a Superior Court Judge at the close of the Crown's case are the same and that there will be a reluctance of the trial judge to overrule a determination made by a colleague of the same court, do not allow much for the independence or integrity of our judges.

While there are a number of technical difficulties that confront us as we move to Phase II much of the underlying unstipulated resistance relates to the issue of "quality". This is important because it must be our obligation to provide the best and most effective judiciary and the best service to the people of Ontario that it is within our power to provide. Having said that however, it must be noted that the issue of "quality" is the same issue that for two decades inhibited the merger of the Supreme and District Courts. While there are always significant adjustments and difficulties to be met in any merger or unification, I believe that these difficulties are transitional in nature. At the end of the day a single trial bench will be, across the board, a quality bench.

Conclusion

The system for the administration of justice designed by Oliver Mowat in the 1880's has with modifications and adjustments served us well for over a hundred years. But it was essentially designed for a different place and a different time, when life in Ontario was much less complex and much more structured; when the

expectations of our citizens about the system of justice and its mandate were relatively narrow and more straightforward.

The time has clearly come to redesign what we have. We undertake the task not only because the pressures imposed on the system are now very great and threaten its capacity to perform effectively; but much more, because we have an obligation to bequeath to our grandchildren a judicial administration that is as effective and as workable as the one that we inherited, albeit designed to meet different pressures and different needs. That, in short, is the work we have undertaken: a co-ordinated effort to redesign the court system in Ontario in the hope and expectation that it will serve effectively for the next hundred years. It would be foolish to pretend that everything we propose will work, or that modifications and adjustments will not be required. Designed perfection is an elusive objective. The modifications and adjustments that experience working within the system dictate will, I am sure, be made as required.

In the decade in which Mowat's changes were introduced and implemented, the Bench, Bar and a significant segment of the community were horrified at the "radical" nature of his proposals. It is not hard to understand why. After all, he proposed among other things a unified court in which, for the first time in Canada, a trial judge was to be vested with all the powers of his Chancery, Common Pleas and Queen's Bench predecessors. It was said that Mowat's proposals threatened the quality of judicial decision making in Ontario. Many at the Bar were unhappy because the court system with which they were familiar was being replaced by something fundamentally new and "unworkable". But Mowat's determination in the face of all this was great if his diplomatic skills were limited. In the words of Senator Gowan of Ontario, "he bore down and toppled over without the slightest hesitation...the obstacles in his way...he was almost like a hippopotamus rushing through a cane brake...".

But the good news for Mowat was that after the plan was accomplished, and a sufficient start made toward its implementation he was able (after a brief sojourn in federal politics) to return to his practice at the Bar, cultivate his garden, and live on into a vigorous old age.

# THE JUDICIARY IN CANADA:
## THE THIRD BRANCH OF GOVERNMENT

**Peter H. Russell**
Department of Political Science
University of Toronto

**McGraw-Hill Ryerson Limited**

Toronto Montreal New York Auckland Bogotá Cairo
Hamburg Lisbon London Madrid Mexico Milan New Delhi
Panama Paris San Juan São Paulo Singapore Sydney Tokyo

# *CHAPTER 8*
# LOWER CRIMINAL COURTS

## *Basic Structure of Canadian Courts*

In Part Four we will look at the seven basic types of court operating in Canada today. The figure below depicts in a simplified way the place of these courts in Canada's judicial structure.

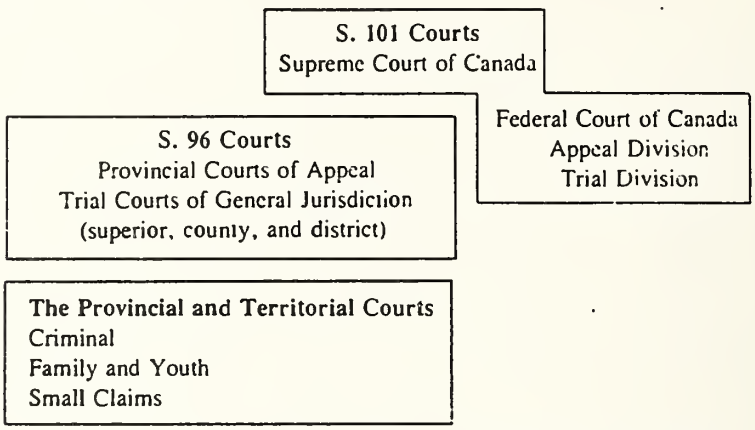



*FIGURE 1 BASIC STRUCTURE OF CANADIAN COURTS*

At the top and on the right are the section 101 courts, the two principal courts established and maintained by the federal Parliament and government: the Supreme Court of Canada and the Federal Court of Canada. The Supreme Court is of course the highest court in the land, the final court of appeal for all matters of law. The Federal Court, established in 1971, absorbed the old Exchequer Court and operates in a number of special areas of federal law. On the left are first the section 96 courts of the provinces and territories, which for the Fathers of Confederation were to be the foundation of Canada's judicial system. All the provinces and territories have a court of appeal and a superior trial court of general jurisdiction. Only three provinces (British Columbia, Nova Scotia, and Ontario) have retained county or district courts as locally based trial courts with a criminal and civil jurisdiction slightly lower than that of superior courts. Finally, at the bottom on the left, are the three main types of provincial "lower court": criminal, family and youth, and small claims. By no means do all of the provinces and territories maintain a separate court for each of these three purposes, but cases dealing with criminal, family and youth, and small claims matters constitute the business of the so-called lower courts across the country.

It must be stressed that this is a functional way of looking at the court system. Canada's courts do not come neatly packaged in these seven forms. The judicial systems of the provinces and territories display a great deal of structural diversity and a bewildering variety of court names. Indeed, there would almost seem to be a conspiracy within the legal profession to complicate judicial structure and the names of courts so that the ordinary citizen will be sure to feel the need for a professional guide to the court system. It is not the function of this book to provide a road map for this complex terrain. Rather, the aim is to help the political scientist and the citizen understand the various functions performed by different types of court and recognize both the practical and political implications of structuring the courts in different ways.

Each of the seven types of court discussed in this chapter has its own peculiar institutional history. Some, like the superior trial court and lower criminal court, have roots deep in British and colonial history. Others, like the family court and the Federal Court, are relative newcomers representing responses to contemporary social problems and political values. If all seven can be said to "administer justice," the justice they provide comes in very different forms. They operate in quite distinct settings with different methods of decision-making, serve different clienteles, and perform a variety of functions within Canadian society. It may seem that the only thing some of them have in common is that they are called courts and are presided over by judges. And yet, as we shall be at pains to point out, all seven to some extent perform the essential judicial function of adjudication—that is, the resolution of disputes about legal rights and duties.

One reason for beginning the discussion of the work of the courts at the bottom of the structure rather than the top is that traditionally the political scientist has been too mesmerized by the Supreme Court. To the extent that students of politics have given any attention to the judicial branch, their gaze has been fixed almost exclusively on the apex of the judicial pyramid. This preoccupation with the Supreme Court fosters the illusion that all power in the judicial system is concentrated at the top. By beginning with the lower courts we hope to correct this unbalanced perception of judicial power.

In this chapter we examine the lower criminal court. This is the court in which all criminal cases begin and most of them end. Thus in Canada it is in the lower criminal court that most citizens will have their only first-hand experience with the judicial system.

## *Structural Variations*

In the common law provinces the principal lower criminal court function is performed by judges appointed to Provincial Courts.[1] In the Northwest Territories and the Yukon this function is performed by judges of the Territorial Courts. Criminal proceedings with respect to adults are by no means the only business of these Provincial and Territorial Courts. In some jurisdictions they also perform the function of youth courts, family courts, and small claims courts. Ontario has

the most specialized structure with its Provincial Court divided into Criminal, Family, and Civil divisions. Nova Scotia has a Family Court which is quite distinct from its Provincial Court and for administrative purposes is under the aegis of the minister of social services rather than the attorney general. In other provinces there are Provincial Court judges, especially in heavily populated urban areas, who specialize in criminal matters or in family court or small claims court work. But in other parts of these provinces and in the northern territories, where population is too sparse to justify the presence of several specialist judges, the Provincial or Territorial Court judge often must be a jack of all trades. While many of the Provincial and Territorial Courts are multi-functional, it is only their role in criminal justice that is under consideration in this chapter.

Quebec, as might be expected, has quite a distinctive lower court structure. After Confederation Quebec, unlike Ontario, retained the Court of Sessions of the Peace and built it into the major provincial criminal court.[2] In the late 1800s, beginning in Montreal and Quebec City there was a transition from the English-style Quarter Sessions of lay justices, to a professional single-judge criminal court. By the early 1900s the judges of this court had a security of tenure and professional qualifications commensurate with those of federally appointed judges.[3] The development of Quebec's Court of Sessions of the Peace reflects the fact that the responsibilities of federally appointed judges did not extend as deeply into Quebec's judicial system as they did in other provinces; Quebec has preferred to retain more control over its own judicial institutions. There were never any county or district courts in Quebec. Most of the criminal jurisdiction exercised by county and district courts in common law Canada was absorbed by the Court of Sessions of the Peace in Quebec. The main exception is jury trials. Quebec's Court of Sessions of the Peace today exercises not only much of the jurisdiction handled by Provincial Court judges in other provinces but also the jurisdiction under Part XVI of the Criminal Code to try those charged with indictable offences (other than offences reserved for the exclusive jurisdiction of a superior court) who elect to be tried by a judge sitting alone without a jury.

Although the Court of Sessions of the Peace expanded steadily through this century and by 1982 had seventy-two judges, it by no means performs all the lower court criminal functions in Quebec. Beside it are two other provincial courts which have significant criminal jurisdiction: the municipal courts and the Provincial Courts. Quebec's municipal courts are descended from recorders courts, which in an earlier era enforced municipal by-laws and heard actions involving local taxes and licence fees. Their establishment is governed by Quebec's Cities and Towns Act. One hundred and thirty-eight Quebec communities operate municipal courts.[4] For the most part they function as traffic courts, except in Montreal, Laval, and Quebec City where they have a much more extensive criminal jurisdiction.[5] Quebec's Provincial Court evolved from district magistrates' courts. Unlike the Provincial courts of other provinces, Quebec's Provincial Courts have a major civil jurisdiction. However, its judges are vested with the criminal jurisdiction traditionally assigned to magistrates and now exercised

by Provincial Courts in the common law provinces. Generally, the criminal work of the Quebec Provincial Court is only important where there is neither a court of sessions nor a municipal court.

## *The Wide Jurisdiction of the Lower Criminal Court*

In 1971 John Hogarth, commenting on the jurisdiction of Canadian magistrates, pointed out that it was broader and covered a wider range of offences "than that given to any lower court of criminal jurisdiction in Europe, the Commonwealth, or the United States."[6] The Provincial Court judges of our day, the successors of the magistrates, continue to exercise a vast criminal jurisdiction which appears to be unmatched by the lower criminal courts of any other liberal democracy.

In Canada the more serious crimes are referred to as indictable offences, the less serious as summary offences. Mixed or, as they are called, "hybrid" offences are those in which the prosecution can choose to proceed either by summary or indictable procedures. The Criminal Code, enacted by the federal Parliament in 1892, determines how the different categories of offences are to be tried. Indictable offences are divided into three classes. The most serious are reserved for the exclusive jurisdiction of a superior court judge.[7] There are very few offences in this category: the main ones are murder and the most serious "political" crimes such as treason, intimidating Parliament, and sedition. At the other end of the spectrum are indictable offences reserved exclusively for trial by a Provincial Court judge sitting alone.[8] These include such offences as theft and driving while disqualified. In the middle are offences which give the accused the opportunity to "elect" the mode of trial. For this category, covering the majority of indictable offences, the accused has three choices: trial by a section 96 judge and jury, trial by a section 96 judge sitting alone, or trial by a Provincial Court judge sitting alone. Thus we can see that with the exception of those few offences reserved exclusively for trial by superior court judge and jury, the Provincial Court judge's criminal jurisdiction covers the full ambit of serious offences, including some for which there is a maximum penalty of life imprisonment. Even for those cases which are tried in a higher court, the Provincial Court judge is involved, for it is this judge who conducts the preliminary hearing to determine whether there is sufficient evidence to justify putting the accused on trial in a higher court.

The Provincial Court judge also deals with most summary conviction offences, which cover the vast majority of prosecutions in Canadian courts. They include a number of the lesser offences in the Criminal Code such as common assault and creating a disturbance in a public place, as well as all provincial offences and violations of municipal by-laws. As the responsibilities of provincial and territorial court judges with respect to indictable offences has expanded, increasing use is being made of lay justices of the peace to try summary offences. Ontario appears to have gone the furthest in this direction and uses justices of the peace sitting alone as a Provincial Offences Court to hear nearly all cases

involving violations of provincial and municipal laws.[9] These cases include most of the minor traffic offences as well as more policy-related matters such as violations of zoning and planning laws. For some years a traffic court presided over by a single lay justice of the peace has operated in the city of Vancouver. Justices of the peace conduct preliminary hearings and hear minor offence cases (in some instances with at least one fellow JP) in several other common law provinces and in both of the northern territories.[10] Quebec also has a Court of the Justice of the Peace which is active mainly in the more remote areas where no other courts sit.[11]

The contemporary use of the lay justice of the peace as an adjudicative officer has very different connotations from the role of JPs earlier in Canadian history. Many parts of colonial Canada followed the British practice whereby members of the local elite served as justices of the peace, exercising a combination of judicial and local government functions. The legacy of this approach is still to be found in sections of the Criminal Code which empower two or more justices of the peace to exercise some of the jurisdiction of a magistrate. But during the nineteenth century Canada moved decisively away from the British model of local justice. Whereas in England, outside of London and one or two other metropolitan centres, banks of lay justices of the peace assisted by a legally trained clerk continue down to the present day to function as the lower criminal court, Canada opted for the paid, "stipendiary" or "police" magistrate.[12] By the late twentieth century the Canadian magistrate had evolved into the Provincial Court judge. In the contemporary Canadian context the lay justice of the peace sitting alone to try cases, far from being a pillar of the local society and the mainstay of the local criminal justice system, is much more at the margin both of society and of the judicial system.

Ironically, the next stage of reform of Canada's lower criminal court system may see more rather than less use of lay justices of the peace. At its worst, the practice of using JPs beyond their traditional pre-trial functions may be just a means of providing a cheap version of justice. We saw in the last part how the Charter of Rights prompted a long overdue review of the working conditions and terms of office of JPs who conduct criminal trials. But in northern Canada an adaptation of the British practice of using panels of respected members of the local community to adjudicate cases may provide a basis for a system of local justice that is not only less costly but is also more socially responsive.[13] Elsewhere, the very expansion of the Provincial Court judge's jurisdiction to cover everything from the most routine parking offence to crimes carrying a penalty of life imprisonment points to the need for a richer mix of backgrounds and aptitudes in the criminal justice system. The highly educated, experienced lawyer who is well equipped to conduct a serious criminal trial is not likely to be the most appropriate type of person to deal with routine driving offences.

An experimental traffic court in metropolitan Toronto provides a good example of the effective use of JPs. Cases are heard by justices of the peace who, although not lawyers, are usually individuals with extensive experience as court clerks.

Motorists have the option of pleading guilty, not guilty, or guilty with an explanation. Those who take the third option discuss their driving record with the justice and, instead of paying the fine (or at least the full fine) are given some professional instruction on good driving practice. This court is primarily engaged not in adjudication but in driver education, a function which lawyer-judges are not the most appropriate persons to perform.

## *Young Offenders*

There is one other branch of criminal justice which can be distinguished from the normal work of the lower criminal court: offences committed by juveniles or, to use current terminology, by "young offenders." In 1908 the federal Juvenile Delinquents Act established the "Juvenile Court" for hearing cases involving any "child" who violated federal or provincial laws or was "guilty of sexual immorality or any similar form of vice."[14] In 1982 the Juvenile Delinquents Act was replaced by the young Offenders Act and the "Juvenile Court" by the "Youth Court."[15]

A literal reading of these acts might lead one to believe that the federal Parliament has actually created a distinct system of courts across Canada. But such a belief would be quite mistaken. All Parliament really did in passing this legislation is establish the *concept* of a special kind of court. It is left to the provinces, exercising their authority under s. 92(14) of the Constitution, to give flesh and blood to the concept: to provide the institutions, the personnel, and the services which can translate the concept into reality. In 1982, as in 1908, the federal government proceeded with its legislative concept without much consultation or co-ordination with the provinces. But that is another story.

What we want to describe here is the institutional form which the provinces gave first to the Juvenile Court and then to the Youth Court. After 1908 it was the provincial magistrate courts that began to exercise juvenile court jurisdiction. In those days municipalities bore the main responsibility for the provision of lower court facilities and only a few felt keenly enough about the Juvenile Delinquents Act to establish a specialized juvenile court with a full-time magistrate. The development of the juvenile court, for at least the first half of the century, was very haphazard indeed.[16] Later in the century, when a number of provinces began to develop family courts as a specialized branch of their Provincial Court systems, juvenile court jurisdiction was given to these institutions. This pattern was particularly marked in British Columbia, Nova Scotia, Ontario, and Quebec. There were good reasons for this merger of responsibilities. The families whose interspousal disputes, neglected children, and truancy problems are before the family court are often the same families whose children are in trouble with the police. The diagnostic approach and close interface with social services maintained by the family court made it a more appropriate institution for fulfilling the objectives of the Juvenile Delinquents Act than the regular provincial criminal court.

The Young Offenders Act represents more than a change in nomenclature. In the words of George Thomson, a judge of the Ontario Provincial Court (Family Division):

> Clearly the Act represents a substantial shift from the juvenile court philosophy of the early twentieth century to one which stresses much more strongly the rights of young offenders as well as accountability for one's behavior, responsibility of the individual and the protection of society.[17]

The act focuses on the adolescent age group from twelve to eighteen and creates a special, adult-like, criminal justice regime for this age group. Children under twelve are removed from any form of criminal prosecution. By way of contrast, the Juvenile Delinquents Act treated all those between seven and sixteen as children (extended to seventeen in British Columbia and Newfoundland and to eighteen in Manitoba and Quebec) and subjected them to a highly paternalistic criminal justice system.

In the Young Offenders Act we can see yet another effect of the rights-oriented liberalism referred to in Part One. Adolescents are to enjoy the due process rights of adults. In this respect the act establishes for Canada what was mandated for the United States by that country's Supreme Court in *Gault* and subsequent decisions,[18] and anticipates changes that would likely be mandated by Canadian courts under the Charter of Rights.[19] No longer can there be institutional confinements of indeterminate length. Young offenders must be charged with specific offences and not simply some form of "vice." There are to be full hearings and the right to representation by counsel at every stage of proceedings. Indeed, a young offender's right to counsel is extended beyond that of an adult in that the Youth Court judge must ensure that counsel is appointed for any young person who requests it, even where legal aid has been refused under a provincial legal aid plan for reasons of financial eligibility or the minor nature of the charge.[20] On the other hand, the punitive aspects of the adult system are modified for young offenders. Unless the young person is transferred to adult court (and it is easier to do this under the YOA than it was under the JDA), the maximum period of incarceration is three years. A much wider range of sanctions and treatments is available, with a clear statutory direction to minimize the deprivation of liberty.

The Young Offenders Act, like the act it replaced, leaves it to the provinces (and territories) to designate the judges who will exercise youth court jurisdiction.[21] Provinces which have been relying on family courts to deal with juvenile delinquents would logically designate their family court judges as youth court judges. That is certainly the case in Quebec, as that province had transformed its social welfare court into the youth court well before the Young Offenders Act.[22] In Ontario an interesting situation has developed whereby the Family Division of the Provincial Court serves as the Youth Court for twelve to fifteen year-olds, while the Criminal Division of the Provincial Court deals with those between sixteen and eighteen.[23] This division of responsibility is highly ques-

tionable. The Young Offenders Act attempts to strike an exquisitely delicate balance between the rights and responsibilities of adulthood and the special circumstances of youth. It imposes some challenging responsibilities on the judges who administer it and it directs that every effort should be made to reinforce family responsibilities rather than having the state, as *parens patriae*, become the surrogate parent. It is unlikely that judges and courts normally concerned with applying the procedures and sanctions of the Criminal Code are well suited for these youth court responsibilities. In this case the provincial institutional response seems almost designed to subvert the federal legislative objective.

## *Judicialization of the Magistracy*

The liberal mutation which has occurred in Canada's political culture and can be seen at work in the transformation of juvenile courts into youth courts has also influenced modern reform of the adult criminal court. That reform was referred to earlier in this book as "the judicialization of the magistracy." It has involved the transformation of magistrates' courts into Provincial and Territorial Courts—a change that occurred in the common law provinces and territories in a span of years running roughly from the late 1960s to the early 1980s.

Much more has been involved here than merely a change in name and titles. Behind the improvements in the selection and terms of office of the provincially appointed judiciary (described in Part Three) was a much stronger emphasis on the role these judges should play in protecting the rights of those who appear before them—a clearer recognition of these judges as independent adjudicators.

As an institution of government the lower criminal court inevitably combines judicial and executive functions. It serves as an instrument of both justice and order. That is one reason why it is the court which is physically closest to the people. It is the institution which sanctions the application of the coercive powers of the state to its own citizens. The exercise of these coercive powers under the mantle of a judicial institution gives them legitimacy. As one looks back on the magistrates who preceded today's Provincial Court judges and back beyond the magistrates to the municipal officials, police officers, Hudson's Bay employees, or captains of militia who performed the lower criminal court function in eighteenth- and nineteenth-century Canada, it is apparent how much more thoroughly intermeshed were the judicial and executive functions in these earlier versions of the lower criminal court. Indeed, the very title "magistrate" connotes this combination of functions: the dictionary defines magistrate as "one clothed with public civil authority; an executive or judicial officer."[24] One of the most vivid and recent accounts of the magistrate's office is to be found in the 1973 report of Mr. Justice Geoffrey Steele which led to the judicialization of Newfoundland's magistrates. Steele reported that, particularly in non-urban areas, the magistrate "was the only legal advisor, judicial officer and law enforcement representative in the community." The crux of his report was "to recommend that the Mag-

istracy of Newfoundland be made an essential part of the Judicial Branch of our Government.''[25]

The Provincial Court and Territorial Court judge of today both in name and in practice is much more like a judge than a magistrate. Much has been done to disentangle the Provincial court judge from the police and the crown prosecutor who are, after all, one of the parties in most of the cases the judge hears. It is no longer the norm for the police and the lower criminal court to share the same physical facilities—what in the West and the Maritimes were often referred to as ''public safety buildings.''[26] The provincialization of administrative and fiscal responsibility for these courts (a crucial element in the judicialization of the magistracy) has provided the basis for a higher standard of court facility. Where, for reasons of convenience, new provincial court buildings include police facilities, they are much more segregated from the judges' chambers and the courtrooms. While still very much in evidence in the corridors and waiting rooms of Provincial Courts, the police seem less in charge of these institutions. British Columbia has established a separate organization of uniformed court personnel to perform the security and many of the other court functions traditionally performed by the police. In few jurisdictions do police now function as prosecutors. However, this practice, which still survives on a significant scale in Newfoundland, has been unsuccessfully challenged as a violation of the guarantee of a fair trial in the Charter of Rights.[27] The modernization of court administration has meant that in some jurisdictions the police and prosecuting attorneys no longer control the scheduling of cases in the lower criminal court.[28]

The changes described above are, as yet, by no means uniform throughout the country. The legacy of the old order can still be felt. In several provinces, for instance, Provincial Court (as well as some higher court) judges serve on police commissions—a carry-over from the days in which the magistrate supervised the police.[29] Even where the various structural and institutional reforms are more fully accomplished, there will continue to be a close relationship between law enforcement officials and lower court judges. Police court liaison officers and crown attorneys who appear in court every day develop a familiarity with judges which will be matched by only a few of the counsel appearing for the accused. These prosecuting officials become, to use Marc Galanter's phrase, ''repeat players'' in the courtroom drama and, as such may enjoy, or at least appear to enjoy, a distinct advantage over the ''one-shotter.''[30] But while it would be too much to expect a complete severing of the nexus between the coercive and judicial arms of the state, there is still much to be gained by way of striking a better balance between liberty and order by continuing with the reforms directed toward the judicialization of the basic criminal trial courts.

When we consider how relatively recent this effort at reforming the lower criminal court has been, the question arises as to why it took so long to judicialize this branch of our justice system. The answer to this question is complex and involves a great many factors. But a class explanation would seem to be the best way of accounting for the indifference shown to the judicious qualities of

the lower criminal court. The clientele of the lower criminal court has been predominantly lower class: individuals with low income and low social status constitute the majority of accused.[31] Of course, this is true of accused who are tried in higher courts. But the higher trial courts—the superior, county, and district courts—have also been much involved in adjudicating disputes about the property and civil rights of the middle and upper classes. If members of these classes had been more involved as litigants in the lower criminal courts, it is unlikely that their shoddy and unjudicial condition would have been tolerated for so long. The vast extension of the criminal sanction, in particular its use in regulating automobile offences, has widened the clientele of these courts in this century and has fostered public interest in their reform.[32] But the deeper and more important factor has been the egalitarianism of the modern welfare state and its philosophy of providing a decent level of public service to all sections of society. It is still the more marginal members of our society who, in terms of personal liberty, have the most at stake in the quality of justice administered in these courts.

One welfare state program that has contributed significantly to the judicialization of the lower court is legal aid. Prior to the mid-1960s the only legal representation available to the indigent accused was that performed on a charitable basis by civic-minded lawyers. The great majority of those processed by the lower courts went without professional legal assistance even when charged with indictable offences.[33] The advent of publicly funded legal aid programs in all the provinces and territories has changed this situation. Now accused who satisfy a means test (set close to the poverty level) have a legal right to a publicly funded lawyer if a gaol sentence or loss of livelihood is likely to result from a conviction.[34] Many jurisdictions have full-time duty counsel at the courts to assist accused persons when they are first brought before the court on arraignment. Although persons charged with minor offences frequently appear without counsel, most of those charged with indictable offences are now represented by counsel.[35] The lower criminal court has become more of an adverserial arena pitting crown counsel against defence lawyers. This should mean that the balance of power is tilted somewhat less to the advantage of the state.

## *The Court's Role in the Criminal Justice System*

Even with the judicializing reforms we have noted, it would be quite misleading to portray the lower criminal court in Canada as an adjudicative chamber in which the judges spend most of their time deciding disputes about the guilt or innocence of accused persons. Anyone who has spent some time around the criminal division of a provincial court will attest to the fact that it is more like a three-ring circus. It is in this court, or at least under the mantle of its authority, that most of the formal preliminary steps in the criminal justice system are performed. It is in this court that all those who are charged and convicted first appear, where questions of bail are settled, and where those who decide not to

contest the charge against them register their guilty plea and are sentenced. A detailed study of the Provincial Court (Criminal Division) in downtown Toronto showed that most appearances before a judge involve requests for remands.[36] When trials occur—and this, remember, is where most criminal trials in Canada do take place—they are not like thrilling Perry Mason dramas unfolding before judge and jury, but rather perfunctory affairs, usually over in a few minutes, often impossible for all but the participating professionals to follow amidst the general hubbub of courtroom activity.

Like other modern industrial societies, Canada has come to rely increasingly on the criminal sanction as a means of maintaining social order. In this setting the lower criminal court operates within what has been aptly termed an "assembly line system of criminal justice."[37] Within such a system the role of the judge becomes marginal. The quality of justice depends more on what is done before trial or without trial. Of the hundreds of thousands of cases entering the system each year, the majority are terminated in some way other than a trial. Data reproduced by Griffiths, Klein, and Verdun-Jones from British Columbia demonstrate this clearly.[38] In that province in 1978, 114,354 criminal cases flowed into the court system. Of these, 98 per cent were ultimately disposed of within the lower Provincial Court. Forty per cent were settled by a guilty plea; in 25 per cent the crown terminated the proceedings by withdrawing the charges, staying the proceedings, or some such device; and 29 per cent went to trial. In the end 6.5 per cent resulted in a dismissal of the charges or a verdict of acquittal. Empirical research in other Canadian jurisdictions reports even fewer trials and a higher incidence of guilty pleas. Richard Ericson's longitudinal study of criminal cases in the County of Peel, near Toronto, for example. reported a guilty plea rate of 80 per cent.[39]

In many cases the guilty plea or withdrawal of charges results from informal negotiations between the accused, or more likely the accused's lawyer, and the crown attorney or sometimes the police. In the locality Ericson studied, "the production of court outcomes took place backstage in discussions among detectives, lawyers and crown attorneys. . . . In the process, the judge serves more as an agent of ratification than adjudication."[40] These negotiations are often loosely and euphemistically referred to as plea-bargaining. Strictly speaking a plea bargain occurs when an accused person agrees to plead guilty in return for either a reduction or withdrawal of charges or the prospect of a more lenient sentence. Empirical research on plea-bargaining is still rather scanty so it is not easy to say exactly how much of it goes on throughout the country. What evidence we have indicates that it most likely occurs in relation to indictable offences where multiple charges are laid and the accused is represented by a lawyer.[41]

We should not be concerned that disputes are settled informally without trial. In both civil and criminal proceedings if both parties are well informed about the facts and their rights we should expect matters to be settled without a trial. But we should be concerned if accused persons are induced to abandon a good defence or the crown to abandon a serious and well-supported charge simply to

reduce the case-load burden of the court system or for the personal convenience of the professionals involved. It is also of concern if the opportunity to settle informally is available primarily to hardened criminals who have a lot to "sell," or to those represented by lawyers who are friendly with local prosecutors, or is systematically withheld from a racial group such as native Canadians.[42]

It is unlikely that the most effective way of dealing with abuses of the plea negotiation process is to follow the earlier advice of the federal Law Reform Commission and simply prohibit it.[43] That recommendation does not fully take into account the positive function of negotiated settlements in a justice system. A more promising approach may be to increase judicial surveillance of the process. In the Canadian legal tradition judges have stuck closely to the role of the judge in the adversarial system and have been reluctant to become involved in what takes place outside the courtroom. They have relied on crown counsel to pursue a just prosecutorial policy and defence counsel to represent the interests of the accused. With so much of the "justice" in the criminal justice system depending on the discretion exercised behind closed doors by prosecutors and defence counsel, it may be time to move in the direction of the continental "inquisitorial" system and provide an independent check on these early stages of criminal proceedings. As Verdun-Jones and Cousineau point out:

> . . . the lack of a requirement under Canadian law that a judge ferret out the critical factors that may have led to the defendant's decision to plead guilty has effectively created an environment in which it is possible for Crown and defence counsel to enter into plea bargains behind the inscrutable veil of secrecy.[44]

They urge that consideration be given to adopting the policy enshrined in rule 11 of the United States federal courts under which any plea agreement must be disclosed to the trial judge. In this system the trial judge is not a party to the negotiation but has a responsibility to ensure that the plea agreement was fair and to give the defendant an opportunity to withdraw it if in the judge's opinion it was not.

## *Sentencing*

Sentencing is one dimension of the criminal justice system in which the decisions of the lower court judge are the dominant factor. Judges in the higher trial courts sentence too, but they deal with only a small fraction of criminal cases. Although prison authorities, parole boards, and probation officers have much to do with the implementation of the sentence once it is made, the judge is the key decision maker as to what the proper sentence should be. For most crimes Parliament has set only maximum penalties. It has given little direction as to the circumstances in which sentencing options such as restitution, probation, absolute and conditional discharges should be used. The sentences meted out by lower court judges can be appealed: for summary conviction offences to a judge of a higher trial court, for indictable offences to a provincial court of appeal. But the appeal courts in various jurisdictions have been slow to develop a clear and consistent

set of sentencing guidelines.[45] Unless the lawfulness of a sentence is in dispute, sentences cannot be appealed to the Supreme Court of Canada. Consequently there is no national jurisprudence on sentencing policy. Indeed, it is not too much to say that if Canada has a penal policy it is primarily the cumulative result of the decisions made by Canada's lower criminal court judges.

These decisions can scarcely be described as adjudicative. The prosecution and defence may make submissions as to what they think is an appropriate disposition—and indeed, through a plea bargain may agree to make a joint submission. But these submissions are not binding on the judge. Nor is the judge's role here to resolve a dispute as to the accused's legal rights or duties. The judge's function in sentencing is to assess the gravity of the offence and the nature of the offender and to determine which of an often wide range of alternatives is the appropriate disposition in the circumstances. These determinations can have a major impact on the liberty and security of Canadians and on the cost of maintaining their penal institutions. The research of Canadian criminologists indicates that while for a long time there may have been an over-reliance on imprisonment, more recently there has been a move away from incarceration. Canada's overall imprisonment rate now appears to be considerably lower than that of the United States.[46]

Much of the literature on sentencing focuses on disparities and inconsistencies in sentencing practices. There is plenty of evidence of variations in sentencing practices in John Hogarth's *Sentencing as a Human Process*, the major empirical study of sentencing in Canada. Hogarth, for instance, reported that among the Ontario lower courts he studied in 1967, "one court used probation in nearly half the cases coming before it, while another never used this form of disposition."[47] Hogarth attributed most of the differences to the penal philosophy of the individual judge. Others emphasize the availability of alternative services and facilities, local community sentiment, and the contribution of other actors in the system, such as the probation officers who prepare pre-sentence reports. There is also some disturbing evidence of the influence of race prejudice.[48]

In the United States there has been a powerful movement to diminish the discretion of the sentencing judge by having the legislature prescribe a more precise "tariff" of penalties. This approach has the attraction of replacing the uncertainty and vagaries of judge-made sanctions with a code of definite and uniform penalties prescribed by a democratic legislature.[49] Given that most American innovations eventually find a following in Canada, this approach to reform is bound to be taken up here. But Canadians should not be too quick to plunge in this direction. Over several generations the fashion in penal philosophy has swung from retribution to rehabilitation and back to retribution.[50] It may be aggravating that our judges do not share a common philosophy of punishment, but we should recognize that our society has not reached a clear consensus on the purpose of punishment, on whether the prime objective should be deterrence, retribution, or reform. We may get closer to "justice" in our sentencing practices by improving the selection of judges and the quality of information available to

them. It is interesting that this is where Hogarth ends up after his massive study of sentencing disparities.

## *Decriminalization*

To advance significantly beyond the improvements made over the last twenty years in the lower criminal court, reform must move in two directions. One is to reduce our society's massive reliance on the criminal sanction; the other is to remove the invidious distinction between inferior and superior courts in the trial of serious offences. While these two types of reform may appear to be unrelated, they actually complement one another. They are both paths for moving away from a bureaucratic, sausage-machine approach to criminal justice toward a system that has a better prospect of delivering something recognizable as "justice": the first by rationing the frequency with which the system must deliver justice, the second by eliminating the double standard of justice.

As long as Canadian legislatures insist on making so many activities crimes it will be very difficult to move away from an assembly-line system of criminal justice. As Professor Baum points out, we have long passed the point where criminal law deals with the most serious violations of society's norms:

> Canadians are presumed to know the 700 sections that constitute the Criminal Code. (Each section of that code is a separate offence.) Add to this the 20,000 offences on the books of the federal government, and another 20,000 offences punishable by fine or imprisonment by the provinces. Left uncounted are the thousands of laws on the books of municipalities. In Ontario alone in a twelve-month period in 1977, the court system received more than four million charges—approximately two charges for every three residents of the province.[51]

This contagion of criminalization stems in part from a growing tendency to equate the moral with the legal. While we should expect the law to conform to our moral standards, we should not expect it to comprehensively embrace our morality. So long as we try to outlaw everything of which we disapprove, be it pot, liquor, pornography, abortion, or monopolies, we will have a justice system in which the most crucial decision-making is not by judges determining guilt or innocence but by the police deciding which of the myriad laws to enforce.

One approach to decriminalization which was all the rage a decade or so ago was diversion. This has proved to be something of a false start. Diversion programs were to focus on reported crimes involving persons with continuing relations: for instance in neighbourhoods, the work place, or the family.[52] The aim was to mend the breach in the social fabric through some form of settlement and restitution, rather than having the accused charged with an offence and sentenced by a judge. While diversion schemes have provided some useful alternative sanctions, they are not really a move away from the coercive application of criminal law. The accused person diverted, for instance, to some form of community service is presumed to be guilty and is under a form of compulsion. But the decision to divert has been made by prosecutorial officials beyond the

purview of an independent judge. The maxim cited by Norval Morris—"the guilty we convict; the innocent we divert"—points to the most troubling aspect of diversion.[53]

Professor Peter Solomon has put forward another proposal which, while not actually amounting to decriminalization, at least has the merit of relieving the courts of processing masses of routine cases. He proposes the limited adoption of a system of "penal orders" used in West Germany for seventy per cent of criminal matters. A penal order

> . . . describes the wrongdoing the accused is alleged to have performed, cites the evidence at hand, indicates the applicable provision of the *Criminal Code*, and specifies the punishment to be imposed upon conviction. The accused has one week in which to object in writing or call for a trial on the merits; otherwise, the order takes effect and has the status of a conviction. Conviction by penal order cannot result in imprisonment; the usual punishment is a fine and, where appropriate, the suspension of a driver's licence.[54]

In some ways the penal order resembles the offence notice used in some provinces for driving offences, except that instead of being issued by the police, it is prepared by a legally qualified prosecutor who reviews the police evidence and approved by a judge who signs the order only if the record raises no doubt about the accused's guilt. Solomon would apply this system only to minor crimes such as some driving offences, possession of cannabis, property offences involving small amounts of money, and public order offences such as causing a disturbance. Even with regard to these offences he would apply it only to persons who have few, if any, previous convictions and are not associated with more serious crimes.

Such a system would at least cut down on the extent to which the lower criminal courts are bogged down with the burden of going through the motions of processing routine cases. In the jurisdiction studied by Solomon and his colleagues 37 per cent of the cases flowing through the court system fitted Solomon's description of a minor crime.[55] Under the penal orders system these cases would still require some prosecutorial and judge time but would save courtroom time and the attendance of all the officials, including police witnesses on overtime who typically are involved in the routine guilty plea. But the major beneficiary might be the accused. As Malcolm Feeley has shown in his study of a lower criminal court in the United States, often the process involved in the court appearances associated with a routine minor crime is much more of a punishment than the sentence finally handed down by the judge.[56]

## *Toward a Single Criminal Court*

Even if we make some progress in relieving the massive case-load burden on the criminal courts, the need for an extensive high-quality adjudicative service to determine guilt or innocence and impose sentence will remain. But a strong case can be made for the proposition that Canada will not have such a service for the trial of all serious criminal offences until we abandon the hierarchical

system of inferior and superior trial courts which has long been a hallmark of the judicial branch of government in Canada.

Over the years a number of scholars and analysts of Canada's criminal justice system have called for a restructuring of the court system which would remove the "lower court" stigma from the primary provincial criminal court. Writing when this court was still presided over by "magistrates," Professor M.L. Friedland put the case in these terms:

> Whatever may have been the justification for the grades of trial courts in the past (when the magistrate was, in fact, dealing with minor cases, as in England where to a great extend he still does), it has long since disappeared in Canada where the magistrate deals with many serious offences for which an accused can be sentenced by the magistrate to life imprisonment.[57]

A few years later, in an examination of this issue carried out for the Law Reform Commission of Canada, Darrell Roberts came to the same conclusion as Friedland. "Our whole criminal process," wrote Roberts, "is debased by the system of various grades of courts when its most important court is looked upon as inferior and subordinate."[58]

The judicialization of the magistracy which we have been tracing throughout this book has done much to improve the quality of the lower criminal court. But the unacceptable stigma of being a lower court dispensing an inferior brand of justice remains. And it is such an unreasonable stigma:—it suggests that a judge who is not competent to conduct a jury trial is competent on his own to try a case which can result in a life sentence. Despite all the reforms of the provincially appointed judiciary, the lower court image continues to restrict recruitment possibilities. And the Criminal Code's classification of offences which determines the court in which cases may be tried makes little sense and unduly complicates our criminal justice system. Ejann MacKaay's study of the labyrinthine paths of justice in the Montreal criminal courts reveals the games lawyers play with the accused's option to elect to be tried in a higher or lower court—games which have nothing to do with the prospects of obtaining justice.[59]

Proposals to unify the criminal trial court recognize that it would not make sense to have the same kind of judge, applying the same procedures, hear every case from the most serious murder trial to a parking violation. Both Friedland and Roberts would have a minor offence tribunal which could be staffed by lay personnel, providing its jurisdiction is confined to what is truly minor. The existing distinction between summary and indictable offences would not be a sound basis for establishing such a jurisdiction: some offences classified as summary can lead to significant fines or six-month jail terms. If the aim of a traffic court is primarily driver education, then from a functional point of view it may make sense to have a specialized institution for these cases. But the key objective of the unified criminal court proposal is to move away from an hierarchically organized system of trial courts. Where the prime function is to determine

guilt or innocence and the appropriate sentence, there should not be an inferior and superior form of justice. The prime need, as Noel Lyon has put it, is

> to work toward an end to the deep division that exists in our courts between superior courts and so-called courts of inferior jurisdiction . . . but substituting for the hierarchical model now entrenched in our thinking a functional model in which all judges belong to an integrated judiciary but are specialized as to function and noted for their competence as judges rather than their position in a hierarchy of ascending power and importance.[60]

This is very much in line with the basic objective of reform advocated throughout this book: the concept of a trial centre staffed by a national judiciary which is neither federal or provincial, higher or lower, serving every major Canadian community.

Already a major step has been made toward this kind of restructuring in those provinces which have eliminated the intermediate trial court, the county or district court, and merged it with the superior court. Chapter 11 will examine this development more closely and the political resistance it has encountered. But to go further and, at least for serious criminal cases, eliminate the distinction between lower and higher trial courts involves surmounting constitutional as well as political obstacles. The Supreme Court of Canada's decision in *McEvoy* rules out the approach to criminal court unification favoured by some commentators and the province of New Brunswick: assigning full criminal jurisdiction on either an exclusive or concurrent basis to provincially appointed judges.[61] Now it would require a constitutional amendment to give the Provincial Court judges the jurisdiction traditionally exercised by a superior court.

A more viable approach would be for the federal government to agree to elevate the provincial and territorial court judiciary to superior court status, as it has already done with county and district court judges in six provinces. Reform of the federal appointing process along the lines proposed in the previous chapter would probably be necessary to secure provincial agreement for this kind of reorganization. The provinces would have to be convinced that federal political patronage is not such a dominant factor in the appointment of superior court judges. On the other hand, there might be some reluctance to go ahead with such elevations in provinces that have given little evidence of reforming their methods of appointing judges. Also, the federal government which pays the salaries and pensions of all superior court judges, not unreasonably, might wish to consider some compensatory adjustment in federal-provincial transfer payments before assuming responsibility for the remuneration of hundreds of provincial court judges.

No doubt there are formidable problems to be worked out in the realms of political-economy and personnel management before Canadians can enjoy the benefits of a unified criminal court. But the logic of the case for moving in this direction is strong.[62] It may be that progress will best be made on a province-

by-province basis beginning with those provinces that have a carefully worked out reorganization scheme and in which court structure policy is not unduly influenced by the views of the senior judiciary.

## *Notes to Chapter 8*

1. For an overview of all aspects of Canada's criminal court system, see Curt T. Griffiths, John F. Klein and Simon N. Verdun-Jones, *Criminal Justice in Canada* (Toronto: Butterworths, 1980), ch. 5.
2. For an account of the Quebec system, see Gerard Trudel, "Le Pouvoir judiciaire au Canada," *Revue du Barreau* (1968), p. 194.
3. In 1908 the judges were required to have practised law for ten years. The requirement was reduced to five years after 1908 but restored to ten in 1946. Courts of Justice Act, SQ, c. T 16, s. 80.
4. Monique Giard and Marcel Proulx, *Pour comprendre l'appareil judiciaire québécoise* (Sillery: Presses de l'Université du Québec, 1985), pp. 25-27.
5. For an analysis of how accused and their counsel take advantage of the option of using the Court of Sessions or the Municipal Court in Montreal, see Ejann MacKaay, *The Paths of Justice: A Study of the Operation of the Criminal Courts of Montreal* (Montreal, Faculté de droit, Université de Montréal, 1976).
6. John Hogarth, *Sentencing as a Human Process* (Toronto: University of Toronto Press, 1971), p. 35.
7. Criminal Code of Canada, s. 427, 429(1). Until 1985 offences in this category had to be tried by a superior court judge and jury. The jury is now optional.
8. Criminal Code of Canada, s. 483.
9. Provincial Offences Act, RSO 1980, c. 400.
10. A study of the role of the JP in Canada is currently being carried out under the direction of Dr. Anthony Doob at the University of Toronto's Centre of Criminology.
11. Courts of Justice Act, ss. 158-213. Jérôme Choquette reported in 1976 that four full-time JPs were used in Montreal to hear minor criminal cases. *Justice Today* (Québec: Gouvernement de Québec, 1976), p. 96.
12. For an account of the historical evolution of the office of JP see Esther Moir, *The Justice of the Peace* (Harmsworth: Penguin Books, 1969). For an account of the JPs' function in contemporary Britain see Elizabeth Burney, *Magistrates, Court and Community* (London: Hutchinson, 1979).
13. An inquiry conducted by W.G. Morrow into the administration of justice in Hay River in the Northwest Territories indicates some of the drawbacks in single members of native communities hearing cases. *Report of Inquiry re: Administration of Justice in one Hay River Area of the Northwest Territories* (Ottawa: Queen's Printer, 1968).
14. Juvenile Delinquents Act, SC 1908, c. 40, s. 2(1).
15. Young Offenders Act, 1980-81-82-83 (Can.), c. 110.
16. Jeffrey S. Leon, "The Development of Canadian Juvenile Justice," *Osgoode Hall Law Journal* (1977), pp. 101-104.
17. "Commentary on the Young Offenders Act," *Provincial Judges Journal* (1984), p. 27.

18. *In Re Gault* (1967) 387 U.S. 1.
19. Between 1982 and 1984 before the Young Offenders Act came into force Canadian judges overruled a number of sections of the Juvenile Delinquents Act on the grounds that they conflicted with the Charter of Rights.
20. Young Offenders Act, s. 11(4).
21. The act also leaves it to the provinces to decide whether the YOA applies to provincial offences.
22. Courts of Justice Act, ss. 109-23.
23. The YOA came into force in two stages: on 1 Apr. 1984 for the 12 to 15-year-olds, on 1 Apr. 1985 for the 16 and 17-year-olds. For an analysis of Ontario's difficulties in implementing the Act, see John Gault. "Political Delinquency," *Toronto Life*, May 1984, pp. 15-17.
24. Funk and Wagnall Standard Dictionary.
25. *Report of Newfoundland Royal Commission into the Magistracy of Newfoundland and Labrador* (St. John's, 1973), pp. 2 and 50.
26. M.L. Friedland, "Magistrates Courts: Functioning and Facilities," *Criminal Law Quarterly* (1968), p. 55.
27. *R.* v. *Hart* (1986), 26 C.C.C. (3d) 438. The trial judge found the system of police prosecutors unconstitutional, as did one of the three judges on the Court of Appeal.
28. For a description of the major role played by police officers and prosecutors in one Canadian province, see H.R. Poultney, "The Criminal Courts of the Province of Ontario and Their Process," *Law Society of Upper Canada Gazette* (1975), p. 192.
29. Philip Stenning, *Police Commissions, their development, composition, duties and powers, contracted study for Royal Commission on Certain Activities of the R.C.M.P.* (Ottawa, 1980).
30. Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculation on the Limits of Legal Change," *Law and Society Review* (1975), p. 75.
31. For a lucid account of the lower-class consumers and middle-class observers of the lower criminal court in Victorian Toronto, see Paul Craven, "Law and Ideology: The Toronto Police Court 1850-80," in David H. Flaherty, ed., *Essays in the History of Canadian Law* II. (Toronto: The Osgoode Society, 1983).
32. For an analysis of the importance of automobile offences in the adult court of the mid-twentieth century, see Stuart Ryan, "The Adult Court," in W.T. McGrath, ed., *Crime and Its Treatment in Canada* (Toronto: Macmillan of Canada, 1965).
33. See *Report of the Canadian Committee on Corrections* (Ouimet Report) (Ottawa, 1969), p. 136.
34. For a suvey of legal aid in Canada today, see Canadian Centre for Judicial Statistics, *Legal Aid in Canada 1985* (Ottawa, 1985).
35. See, for example, Larry Taman, "The Adversary Process on Trial: Full Answer and Defence and the Right to Counsel," *Osgoode Hall Law Journal* (1975), p. 251. It is possible that the right to a fair trial in s. 11(d) of the Charter of Rights will be interpreted to extend access to publicly funded legal representation beyond what is now provided by statute.
36. Robert G. Hann, *Decision Making in the Canadian Criminal Court System: A System Analysis* (Centre for Criminology, University of Toronto, 1973), tables 5.6 and 5.7.

37. For an analysis of the assembly-line features of the system, see Daniel Jay Baum, *Discount Justice: The Canadian Criminal Justice System*, (Barrie: Burns and MacEachern, 1979).
38. Griffiths *et al*, *Criminal Justice in Canada*, pp. 146-47.
39. Richard V. Ericson, *Making Crime: A Study of Detective Work* (Toronto: Butterworths, 1981), p. 198.
40. Ibid., p. 221.
41. For an examination of existing research, see Simon N. Verdun-Jones and F. Douglas Cousineau, "Cleansing the Augean Stables: A Critical Analysis of Recent Trends in the Plea Bargaining Debate in Canada," *Osgoode Hall Law Journal* (1979), pp. 251-54.
42. D.F. Wynne and T.F. Hartnagel, "Race and Plea Negotiations: An Analysis of Some Canadian Data," *Canadian Journal of Sociology* (1975), p. 147.
43. Law Reform Commission of Canada, *Working Paper 15: Criminal Procedure: Control of the Process* (Ottawa, 1975). The commission's position is based largely on Gerald Ferguson and Darrell Roberts, "Plea Bargaining: Directions for Canadian Reform," *Canadian Bar Review* (1974), p. 498.
44. Verdun-Jones and Cousineau, "Cleansing the Augean Stables," p. 237. For a more far-reaching proposal to modify the English adversarial system along European lines, see Patrick Devlin, *The Judge* (London: Oxford University Press, 1979), ch. 3.
45. See J.V. Decore, "Criminal Sentencing: The Role of the Canadian Courts of Appeal and the Concept of Uniformity," *Criminal Law Quarterly* (1964), p. 324.
46. See the evidence summarized in John Hagan, *The Disreputable Pleasures* (Toronto: McGraw-Hill Ryerson, 1977), pp. 166-69.
47. Hogarth, *Sentencing as a Human Process*, p. 12.
48. Evidence of discrimination against non-Caucasians is presented in K.E. Renner, and A.H. Warner, "The Standard of Social Justice Applied to an Evaluation of Criminal Cases Appearing Before the Halifax Courts," *The Windsor Yearbook of Access to Justice* (1981), p. 62.
49. "Criminal Sentencing in Transition," *Judicature* (Oct.-Nov. 1984).
50. For an account of these fluctuations, see Martin L. Friedland, *A Century of Criminal Justice* (Toronto: Carswell, 1984), esp. ch. 8.
51. Baum, *Discount Justice*, p. 18.
52. For the philosophical rationale for diversion, see John Hogarth, "Alternatives to the Adversary System," in Walter Tarnopolsky, ed., *Some Civil Liberties Issues of the 1970's* (Toronto: Osgoode Hall Law School, 1975). For a set of diversion proposals, see Law Reform Commission of Canada, *Working Paper 7: Diversion* (Ottawa, 1975).
53. Norval Morris, *The Future of Imprisonment* (Chicago: University of Chicago Press, 1974), pp. 10-11.
54. Peter H. Solomon, Jr., *Criminal Justice Policy, From Research to Reform* (Toronto: Butterworths, 1983), p. 74.
55. This is Peel County in Ontario, the same jurisdiction on which Richard Ericson's study, *Making Crime*, is based.
56. Malcolm Feeley, *The Process Is the Punishment* (New York: Russell Sage, 1979).
57. Friedland, "Magistrates Courts: Functioning and Facilities," p. 72.
58. Darrell Roberts, "The Structure and Jurisdiction of the Courts and Classification

DRAFT

# COURT REFORM: PHASE II

## Unified Criminal Court and Appeal Court Reform

## A DISCUSSION PAPER

COURT REFORM TASK FORCE
MINISTRY OF THE ATTORNEY GENERAL
September, 1990

# UNIFIED CRIMINAL COURT
# and
# APPEAL COURT REFORM

## CONTENTS


Page

Introduction

**Part I: A Unified Criminal Court for Ontario..... 1**

Criminal Court Hierarchy: A "Mechanism for Delay".... 1
Problems Related to a Hierarchical Structure..... 1
Objectives of Structural Reform of the Criminal..... 3
Court System
General Description of the Unified Criminal Court.... 3
Appointment of Incumbent Judges..... 4
Qualifications for Appointment..... 4
Assignment of Judicial Responsibilities..... 4
Variety of Judicial Work..... 4
Informal Specialization in a Court of..... 5
General Jurisdiction
Has This Been Done Before?..... 5
Unified Criminal Court Facilities..... 6
Effective Operation of a Unified Criminal Court..... 6
Criminal Trial Procedure and Structural Reform..... 7
Extraordinary Remedies, Summary Conviction ..... 7
Appeals and Bail Reviews
Advantages to Practitioners..... 8
Advantages to the Public..... 8

**Part II: Appeal Court Reform..... 9**

Why Reform the Appeal Process?..... 9
Impact of Trial Court Reform..... 9
Caseload Pressures and Other Concerns..... 12
Specialization..... 13
Regional Access..... 13
Use of Trial Judges on Appeal..... 14
Principles of Appeal Court Design..... 15
Long-Term Structural Options..... 16
Model I (Intermediate Appeal Court)..... 18
Model II (a variant on Model I)..... 20
Model III (One-Tier Appeal Court)..... 24
Model IV (a variant on Model III)..... 26
Special Issues..... 27
Summary of Options for a New Appeal..... 32
Court Structure

## Introduction

On May 1, 1989, Attorney General Ian Scott announced comprehensive proposals for the structural reform of Ontario's courts, to be implemented in two phases.

In the first phase, implemented on September 1, 1990, the High Court, the District Court, the surrogate courts and the Provincial Court (Civil Division) are combined into a single entity known as the Ontario Court (General Division), with branches known as the Divisional Court and the Small Claims Court. The other division of the Ontario Court of Justice, the Provincial Division, results from the amalgamation of the Provincial Court (Criminal Division), the Provincial Court (Family Division) and the Provincial Offences Court.

With the second phase of court reform, the amalgamation of Ontario's trial courts will be completed. The General Division and Provincial Division of the Ontario Court will be combined into a single, non-hierarchical trial court consisting of three informal divisions specializing in criminal, civil and family matters.

With respect to family matters, the advantages of a unified trial court are well understood. The successful experience of Hamilton's Unified Family Court will provide a model for the operation of the unified court in family proceedings.

With respect to civil matters, the first phase of court reform amalgamates the trial courts, conferring on the Ontario Court (General Division) all the civil jurisdiction that formerly belonged to the High Court, the District Court, the surrogate courts and the Provincial Court (Civil Division). The Small Claims Court is to be a branch of the General Division rather than a separate court.

As a result, the questions and concerns that arise in connection with the second phase of court reform largely focus on two areas: the proposed unified criminal court, and the effect of consolidation of the trial courts on the appeals process. This paper deals with those two areas. Part I examines the concept of a unified criminal court and Part II deals with structural reform at the appellate level.

## PART I

## A UNIFIED CRIMINAL COURT FOR ONTARIO

### Criminal Court Hierarchy: A "Mechanism for Delay"

In a working paper released in the spring of 1989, the Law Reform Commission of Canada recommended a unified criminal court as the method for rationalizing the country's complicated criminal court system. The commission questioned the hierarchy of overlapping criminal jurisdiction in Canada as an anachronism carried over from the time of Confederation when magistrates had little or no legal training.

Elimination of hierarchy in criminal jurisdiction has also been advocated by legal scholars and political scientists. Professor Peter Russell, in The Judiciary in Canada (1987), suggests that a much-needed "high quality adjudicative service to determine guilt or innocence and impose sentence" in all serious criminal cases will not be achieved in Canada until the hierarchical system of inferior and superior trial courts is abandoned.

Professor Russell's comments echo the observations of Professor Martin L. Friedland, who studied conditions in magistrates' courts across Canada in 1968. Professor Friedland harshly criticized the third-class position of the magistrate in the criminal justice system, which he felt contributed to inferior conditions in their courts.

As early as 1906, Dean Roscoe Pound of the Harvard Law School called for unification of the courts, calling a multiplicity of courts "characteristic of archaic law".

Support for a unified criminal court also comes from those who are arguably most familiar with the daily operation of the province's criminal courts. Since 1986, provincial criminal judges in Ontario have strongly endorsed the concept of a unified criminal court as a remedy for the expense and delay in the present system. A 1987 report by the judges on the operation of the present multi-level criminal court system characterized it as a "mechanism for delay."

### Problems Related to a Hierarchical Structure

The hierarchical division of trial level courts into "superior" and "inferior" courts supports a public perception that there is a distinction in status and respect to be accorded to different trial judges or courts because of their place in the hierarchy. This in turn causes concern that "inferior" justice is delivered by "inferior" courts or that one court is reserved for the rich, another for the poor.

However, in Ontario the qualifications for judicial appointment to either court level are identical. The range and seriousness of the matters placed within the jurisdiction of the "inferior" courts by the Criminal Code presumes equal judicial competency: with the consent of the accused, a judge of the Provincial Court has the same jurisdiction to try nearly every criminal offence over which a "superior" court has jurisdiction.

There is no apparent justification, therefore, for two different levels or qualities of justice. Judges may certainly continue to perform different functions, but within a single court. All judges, regardless of function, should be rendering a quality service.

Multiple levels of court also create an unnecessarily complex court system which causes public confusion about the jurisdiction of the various levels of court and the powers of the judges presiding in them. Even lawyers share this confusion, especially when different levels of court exercise overlapping functions.

This causes some lawyers to make mistakes about the appropriate level of court for the trial of their clients. Other practitioners seek tactical advantage by moving cases from one level to another for the purpose of delaying the trial or "judge-shopping."

Such confusion and gamesmanship create public cynicism and distrust of the justice system. The inability of the public to understand an unduly complex court system may be the first impediment to access to justice, which some observers now view to be constitutionally guaranteed under the fundamental justice provision of The Charter of Rights and Freedoms. Lack of understanding may also contribute to public failure to participate in issues involving the administration of justice.

As a practical matter, delays are inevitable in a multiple level court system, since the courts at each level schedule their cases independently of each other. After a case has commenced and travelled through one court system, it proceeds again through another court system before final disposition. A great deal of time may lapse between first appearance at one court level and sentence or acquittal in another. The transfer of the case from one court to another also increases the number of court appearances in the case, usually for the purpose of scheduling proceedings in each separate court.

A two-level court structure of necessity has built-in administrative inefficiency. The court systems at different levels employ separate personnel and purchase separate machinery

to perform the same work at each level, resulting in additional paperwork and duplication of efforts. These inefficiencies tremendously compound the costs of the administration of justice.

**Objectives of Structural Reform of the Criminal Court System**

The first objective in restructuring the criminal court system is to achieve fairness. The new court structure must ensure that judges of the highest quality are available to hear all criminal matters and that the most difficult and important cases are directed to the best qualified judges. The structure must provide flexibility in approaches to handling different kinds of cases while guaranteeing consistency and predictability in decision-making.

The criminal court structure, like the larger court system of which it is a part, should be readily understood by the public and the lawyers practising within it. It should permit speedy decision-making where desirable. Offices and hearing locations should be accessible to the public throughout the province.

The restructured criminal court should minimize administrative delays and simplify procedural steps. It should efficiently deploy existing judges, court staff, and facilities.

**General Description of the Unified Criminal Court**

The unified criminal court would be established as an informal division of the Ontario Court of Justice. Its judges would have comprehensive jurisdiction to try every type of offence whether summary, hybrid or exclusively indictable. Two other informal divisions would deal with civil and family law cases respectively. The judges of all three divisions would have the same comprehensive jurisdiction and could move from division to division as assigned.

All judges of the Ontario Court of Justice, regardless of their area of specialization, would have equal jurisdiction and status. No disparities would exist between judges in salaries, independence or forms of address.

In order for the Ontario Court judges to exercise comprehensive jurisdiction, all must be appointed by the Governor General under section 96 of the Constitution Act, 1867. Section 100 of that Act requires the payment of federally-appointed judges' salaries by the federal government. Before implementation, the federal and provincial governments would need to develop a mutually satisfactory mechanism for the appointment of the judges of the unified trial court.

**Appointment of Incumbent Judges**

The appointment to the Ontario Court of Justice of incumbent provincial judges formerly assigned to the Provincial Court (Criminal Division) is a matter for federal determination. Because of the special expertise they have developed through daily handling of criminal cases, these provincial judges should be considered well qualified for federal appointment to the new court to sit in the unified criminal court on cases as assigned by the chief justice and the regional senior judges.

**Qualifications for Future Appointments**

Judges sitting in the unified criminal court should have interest and expertise in the area of criminal law. The federal requirement that candidates for the bench have ten years' experience at the bar would continue to apply. (Ontario has the same requirement for judicial appointments.)

**Assignment of Judicial Responsibilities**

Cases in the unified criminal court would be assigned by the chief justice and regional senior judges, as the principle of judicial independence requires. The assignments should respond to the criminal justice needs of each community. It is expected that the regional senior judge would assign cases to the judges of the region according to their experience, expertise, and interests. A regional senior judge might devise a training rotation that would expose newly-appointed judges to progressively more serious criminal matters before assigning them to complex trials, including jury trials. Regional senior judges would also have the authority to assign judges to cases anywhere in their region (allowing cases to be heard by judges from other parts of the same region), and the chief justice would have the authority to assign judges from one region to sit in another.

**Variety of Judicial Work**

Regional senior judges' policies with respect to the assignment of cases might occasionally place restrictions on the kind of criminal matters a judge hears. However, a unified court structure would remove formal restrictions on jurisdiction that presently limit the variety of judicial work available to judges. Such restrictions often have no relation to the abilities of individual judges. The unified court model would not require that certain judges be limited to hearing only preliminary inquiries and summary conviction matters for the rest of their judicial careers while other judges are similarly restricted to murder trials.

The unified criminal court would afford all judges the opportunity to hear the full range of criminal cases. The possibility of such variety offers the advantage of sustaining long-term job satisfaction for judges in the new court. This in turn should ensure a high level of morale among the judiciary and attract the most desirable candidates to it.

**Informal Specialization in a Court of General Jurisdiction**

Vertical integration of the courts and the creation of three informal divisions brings the expertise of specialist judges to the cases heard in each division.

Just as many lawyers have been forced to specialize to provide better service to their clients, specialist judges potentially offer greater knowledge and efficiency in the handling of a growing caseload. This is an important factor when judicial resources are strained, yet complex laws require sensitive and knowledgeable balancing of the interests of individuals and the community.

However, excessive compartmentalization also has disadvantages, including judicial burnout or jadedness and the reluctance of excellent judicial candidates to join a "narrow" court. These problems would be overcome in the Ontario Court of Justice by a flexible form of specialization that allows a judge sitting in one division to develop new areas of expertise by rotation into another division (subject, of course, to the approval of the chief justice). The highly valued principle of judicial generalism would remain vital in the new court system.

**Has This Been Done Before?**

Although a unified criminal court system is still without precedent in Canada, the province of New Brunswick proposed legislation in 1982 that would have established a unified criminal court in that province. The court was to consist of provincially-appointed judges and, for this reason, the Supreme Court of Canada found New Brunswick's proposal to be <u>ultra vires</u> the provincial legislature. Ontario's unified criminal court would be established at the superior court level.

In the United States, seven jurisdictions (District of Columbia, Idaho, Illinois, Iowa, Massachusetts, Minnesota, and South Dakota) have unified their trial court systems. (The states of Kansas, Missouri and Wisconsin also have unified trial courts. However, these courts do not deal with municipal and traffic cases. In Ontario such cases would be heard by justices of the peace sitting as part of the unified court.)

**Unified Criminal Court Facilities**

The unified criminal court would integrate all three former court levels exercising criminal jurisdiction -- High Court, District Court, and Provincial Court. The size of each community's unified criminal court would be determined by the amount of judge-time that all courts having criminal jurisdiction currently need to do the community's criminal law work. All types of criminal charges could be heard at all criminal court locations, and thus all proceedings involving a particular charge could take place at the same location.

Judges qualified to hear the entire range of criminal matters would be available for each court location. Depending on the part of the region in which the judges presided, some judges might be required to travel from a base location to other locations in the region to serve smaller communities. Such assignments would be in the discretion of the regional senior judge.

Courthouse conditions must be suitably dignified for the trial of all criminal matters, no matter how simple or serious. Over time, some existing court facilities may require upgrading to accommodate the community's unified criminal court.

**Effective Operation of a Unified Criminal Court**

In the unified criminal court, the setting of dates and allocation of trial court resources for all proceedings in relation to a particular criminal matter would be facilitated by a single, central administration. An accused person would be able to obtain a date for a preliminary inquiry or trial at an early appearance, regardless of the charge. The setting of this date would not require putting the case over to another day to allow the accused to re-attend in another level of court. A unified structure would also make possible more effective scheduling through a centrally-controlled computer system.

In addition to enhancing efficiency and reducing delay, a unified court system would facilitate the elimination of costly duplication of administrative services created by multiple court levels. It would also permit maximum flexibility in the deployment of judges. Cases would not be congested at one court level while resources at another level were under-utilized.

**Criminal Trial Procedure and Structural Reform**

The only substantial change to criminal procedure brought about by structural reform of the criminal court system would be reformulation of routes of appeal from the unified court (discussed in Part II of this paper). Due process safeguards would not be jeopardized by court reform.

In particular, the introduction of the unified criminal court does not mean the disappearance of the preliminary inquiry. While judges of equal jurisdiction and of the same court would preside over the preliminary inquiry and trial of the same charge, the same judge would not hear both matters. In Quebec, where the same court hears both preliminary inquiries and trials, the judge presiding over the preliminary inquiry does not, as a matter of practice, hear the trial. In Ontario, this could be dealt with administratively or by way of a formal amendment to the Criminal Code to preclude the judge who conducted the preliminary inquiry from hearing the trial except on consent of the parties.

**Extraordinary Remedies, Summary Conviction Appeals and Bail Reviews**

Part II of this paper addresses particular structural questions that arise from different appeal court options. Within a unified trial court structure, special attention needs to be given to extraordinary remedies, summary conviction appeals and bail reviews. These could be dealt with at the trial level or by the appeal court. The choice of the new appellate structure affects the forum in which these matters would be heard.

If an intermediate court of appeal were adopted for Ontario, a two-tiered appellate structure would be created. In this case, the intermediate court of appeal could be given jurisdiction to grant extraordinary remedies, and hear summary conviction appeals and bail reviews. The judges of this court could hear these matters alone or in panels in the regional centres and other selected centres with sizeable caseloads or in remote locations. Single intermediate court judges in Toronto could be available to conduct bail reviews and grant extraordinary remedies in cases of urgency.

An appeal with leave to the final court of appeal could be available in matters involving judicial review and summary conviction appeals.

A variant of this model would have judges drawn from the unified trial court making up an appeals branch of the court. These judges would sit in panels to hear applications for

extraordinary remedies, summary conviction appeals and bail reviews in the region where each matter originated. This branch would structurally resemble the present Divisional Court and would combine the existing jurisdiction of that court with the appellate jurisdiction of the District Court.

If a single tier appeal court model were established, the jurisdiction to grant extraordinary remedies could be conferred on the unified trial court. Three-judge panels in the region where the matter arose could entertain applications for judicial review. Similarly, panels of unified trial court judges could review bail orders made by single judges of the same court. (Bail orders made by justices of the peace could be reviewed by a single judge of the unified trial court). Urgent cases could be heard by one Court of Appeal judge in Toronto. In either case, an appeal to a panel of the Court of Appeal could lie as of right.

In this option, it would probably be most productive for summary conviction appeals to be handled by single judges of the Court of Appeal based in Toronto but sitting on a regular basis in the region where the matter arose. The chief justice could assemble larger panels to hear particularly sensitive or important appeal cases. These alternatives are discussed in greater detail in Part II of this paper.

**Advantages to Practitioners**

Reduction of the delays that are inevitable when cases must pass through different court levels has benefits for the criminal law practitioner. A single-level criminal court with a central administration would allow a more timely turnover of practitioners' files. While maintaining fewer active files at one time, practitioners could complete the same or a greater number of cases in a given period without any adverse effect on earnings.

**Advantages to the Public**

This simple and understandable court structure would eliminate public confusion about the jurisdiction of the court and the powers of the judges presiding in it. A non-hierarchical court also removes any basis upon which the public might perceive that there is a distinction in status and respect to be accorded to different trial judges or courts, or a difference in the quality of justice they provide. The public must have confidence in the integrity of the criminal trial process and the principle of equal justice for all. As Professor Russell notes, "Where the prime function is to determine guilt or innocence and the appropriate sentence, there should not be an inferior and superior form of justice."

## PART II

## APPEAL COURT REFORM

A litigant's right to have the decision of a trial judge or administrative tribunal reconsidered on appeal is a fundamental element of our justice system. An appeal court fulfills two functions: it corrects errors made by the trial judge or by an administrative tribunal (a function that is more important to individual litigants than to the public at large) and it develops and guides the jurisprudence of the province. A sound appeal structure is vital to the quality of justice the whole court system provides.

Part II of this paper considers the province's existing appeal process, discusses the need for reform and presents alternatives.

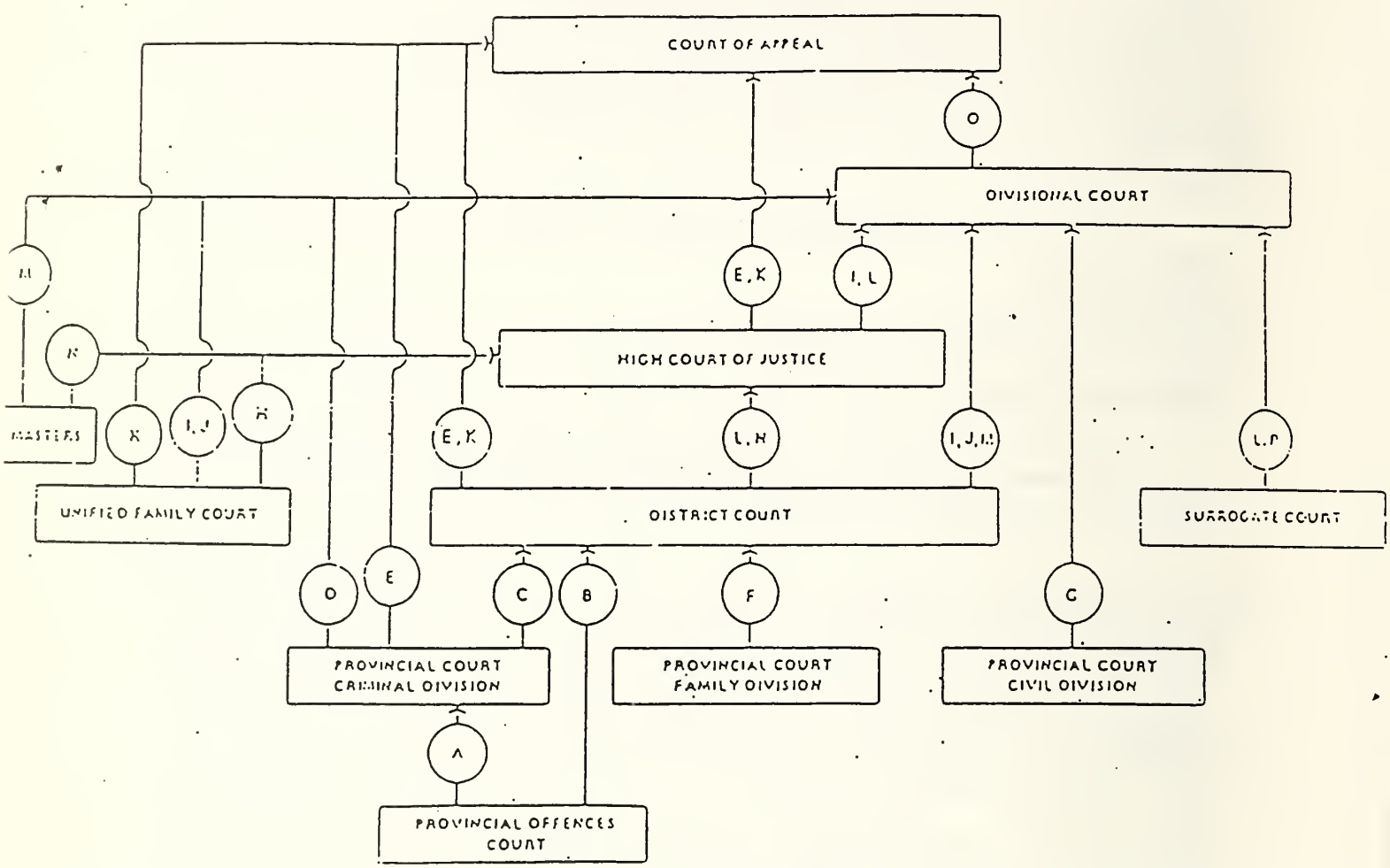
### WHY REFORM THE APPEAL PROCESS?

#### Impact of Trial Court Reform

Prior to the Phase I amendments, appeal routes in Ontario were extremely complex (see diagram on next page). This was the result of the sheer number of trial courts and the ad hoc nature of the historical development of the court system.

There were appeal courts at different levels because several trial courts also acted as appellate courts. Provincial offence appeals from decisions of justices of the peace were heard by provincial judges. Appeals from summary conviction and family law decisions of provincial judges were heard by District Court judges. The High Court of Justice heard appeals from interlocutory orders of the District Court and the Divisional Court heard appeals from most final District Court orders in civil matters. The Divisional Court also had jurisdiction over applications for judicial review, appeals under particular statutes such as the Landlord and Tenant Act, and appeals from many administrative tribunals. The Court of Appeal, Ontario's final appeal court, heard some matters such as appeals of indictable offences as of right and others by leave only.

## ROUTES OF APPEALS
## PRIOR TO PHASE I OF COURT REFORM




A - appeals under Parts 1 & 11 of the POA, and Part 111 if heard by a justice of the peace
B - appeals under Part 111 if heard by a Provincial Court judge
C - summary conviction appeals, generally
D - summary conviction appeal on a question of law
E - indictable offences
F - FLA, CFSA and most other matters
G - final orders over $500
H - interlocutory orders which could be made by a DCO judge
I - final orders where the amount is $25,000 or less
J - interlocutory orders made in capacity as local judge
K - final orders where the amount is more than $25,000
L - interlocutory orders
M - final orders within jurisdiction of a master
N - interlocutory orders within the jurisdiction of a ma
O - final orders on a question of law with leave
P - final orders

Phase I, because it contemplates the retention of both provincially-appointed and federally-appointed trial levels, will not substantially affect appeals. Phase I does bring two changes to the appeals process. First, the Divisional Court will sit regularly in all eight regional centres rather than primarily in Toronto. This should improve access for litigants throughout Ontario in civil appeals and in judicial review. The roughly 200 judges of the General Division, including former District Court judges who reside throughout Ontario, are eligible to sit in the Divisional Court. This will give the chief justice greater flexibility in judicial assignments and also lends itself to better regional service. Second, appeals from provincial judges in summary conviction offences, child welfare cases and family matters will be heard by single judges of the General Division rather than as now by single District Court judges. These changes represent a modest improvement in appellate access.

However, the changes anticipated by the Ministry in Phase II are extremely significant for the appeal process. The merger of the General Division and Provincial Division removes the existing hierarchically-based means of ensuring independent hearings in summary conviction appeals, appeals of provincial offences tried by a judge, and matters arising under provincial family and child welfare legislation. In Phase I these will be tried in the Provincial Division by provincially appointed judges and heard on appeal by single judges of the General Division. But in Phase II these matters will be tried by superior court judges. A lack of detachment might be perceived should a single judge of the Ontario Court of Justice sit on an appeal from a judge of the same court. Because an independent hearing is essential to the integrity of the appeal process, new routes of appeal in these matters must be defined.

These appeals constitute over a third of the appeals heard in Ontario each year. For example, the District Court disposed of 2,577 summary conviction appeals in 1989. By way of comparison, the Court of Appeal disposed of 2,940 appeals and the Divisional Court disposed of 1,012 in the same period. A new place in the appeal court structure, ensuring independent appellate review, must be developed for these appeals. The option of maintaining the status quo in appeal court structure is really not available in the context of Phase II of trial court reform.

Caseload Pressures and Other Concerns

Since 1972, when the Divisional Court was created in part to ease the burden on the Court of Appeal, the length and complexity of appeals to the Court of Appeal has increased. This appears to be due to the presence of more lawyers, widely accessible legal aid, new fields of litigation, new and expanded areas of legislation such as family and environmental laws, and the impact of the Charter of Rights and Freedoms.

Although the number of criminal appeals added each year has not increased dramatically since 1982 (from 1,960 to 2,182 in 1989), cases appear to be taking longer to hear and decide. As a result there is a backlog of criminal appeals. The speed with which civil appeals are heard is apparently being compromised as the court gives priority to criminal matters. (The number of civil appeals disposed of annually has declined in the last three years from 780 to 520. In civil appeals, the present delay from the date when the case is ready for hearing to the date when it is actually heard is over 12 months. In criminal appeals it is 8 months.)

The advent of the Charter, combined with a growing perception that the courts should play a role as an agent of social equality, suggests that the jurisprudential role of the Ontario Court of Appeal is more important today than ever before. At the same time, the Supreme Court of Canada has gradually reduced its caseload in the field of private law to a fraction of that of the Ontario Court of Appeal, making the Court of Appeal more and more Ontario's court of last resort in civil matters. In 1989, the Supreme Court of Canada heard a total of 18 Ontario appeals. In the same year, 94 applications from Ontario for leave to appeal were heard and 14 were granted. The new Chief Justice of Canada has indicated that the Supreme Court has completed the initial cycle of (mainly criminal) Charter cases and that greater attention can be paid to civil matters. But, at the rate of about 130 dispositions a year, a reapportionment of priorities will have limited impact on the role of the Ontario Court of Appeal. It must be remembered too that the Supreme Court does not fully control its criminal docket, thus reducing its capacity to change directions. It is clear that the Ontario Court of Appeal will remain a tribunal of great importance in defining the province's jurisprudence.

Concerns also arise with respect to the effect the number of judges on the Court of Appeal has on consistency of decision-making. Litigants and society at large must be able to rely on the court to steer a firm and clear course. The combination of more, and more complex, cases has prompted a gradual increase in the size of the court to sixteen judges,

including the chief and associate chief justice, plus three supernumerary judges. In no American state does the final appeal court number more than nine judges. However, not every jurisdiction seeks assurances of consistency in numerical restrictions. Quebec, with a smaller population, has an appeal court of nineteen split between Montreal and Quebec City, together with seven supernumerary appeal judges. Appellate reform must address the need to maintain a consistent approach regardless of which structure is adopted.

**Specialization**

The proposal to create a trial court in which judges would specialize in one of three major areas raises the question of specialization at the appellate level. Specialization could be useful in an appeal context just as in a trial context. For example, complex legal issues may be more readily addressed by specialist judges than by generalists and less time may be spent in argument by counsel providing background legal analysis. Judicial specialization reflects the specialization of the bar. A specialized court could attract highly qualified candidates who would be interested in continuing to work in their area of expertise from the perspective of the bench. Litigants in non-traditional areas such as social welfare law could be assured that their issues were being considered by judges with a strong background in their field.

The concept of specialization has been applied in some appeal courts, notably the English Court of Appeal, which has a criminal and a civil side. About a dozen of its 28 judges focus on one side or the other. Some American states, Texas for example, have created a criminal appeal court. There is already some degree of informal specialization in the Ontario Court of Appeal. In addition, a major reason for the creation of the Divisional Court was to develop a court specializing in administrative law.

The concept of specialization at the appellate level can be criticized, however. Some argue that specialization, especially at the appeal level, is characterized by an unduly narrow perspective in judicial decision-making. Generalist judges are better able by nature to ensure the broad outlook needed in considering the implications of appeals, it is suggested.

**Regional Access**

During the Ministry's preliminary consultation on appellate reform in 1989, lawyers outside Toronto expressed frustration with the Toronto-centred appeal process. They argued that the cost of appealing civil matters to the Divisional Court or Court

of Appeal in Toronto often negated their clients' appeal rights.

The obstacle of distance constitutes a different problem in the criminal field. For example, when the Court of Appeal significantly reduces the sentence imposed in a trial that attracted a great deal of local attention, citizens may feel the court is out of touch. Although a central appeal court ensures decision-making detached from the pressures of controversial local trials, there are concerns that the Court of Appeal is too remote.

The Ministry was urged to consider structural reforms that established a better balance between detachment of the appellate judiciary and regional accessibility. To some extent Phase I, which establishes the Divisional Court as a regional appeal court, accomplishes this (although not in criminal appeals, which are the subject of many of the concerns). As in the development of the trial court proposals, account must be taken of the tremendous size of the province and its population distribution.

It should also be noted that improving regional access may work against the development of a specialized appellate bench. The caseload in an outlying region may be too small, for example, to sustain an administrative law appeal panel. A balance between specialization and regionalization is required.

**Use of Trial Judges on Appeal**

Canadian jurisdictions have traditionally made extensive use of trial judges to hear appeals. In fact, the majority of Ontario appeals are heard by trial judges. In many U.S. jurisdictions only full-time appeal judges hear appeals.

Opinion is divided over the appropriateness and utility of this technique. Some argue that appellate judging requires special skills which are difficult to develop and exercise when a judge is moving back and forth between trial and appeal duties. Others suggest that the perspective and experience of trial judging is invaluable when sitting on appeals and that appeal judging on a part-time basis is a good training ground for future court of appeal judges. Eliminating the appeal role of trial judges would substantially reduce the workload of trial courts and would require the appointment of additional full-time appeal judges, although this would probably not result in a net increase in the total numbers of judges once a period of transition was completed.

## PRINCIPLES OF APPEAL COURT DESIGN

Based on the foregoing discussion of pressure to reform the appeal structure and associated problems, the following principles are proposed upon which a new appellate structure should be based:

### 1. Quality

The structure should encourage the production of judgments of high quality. Expert and experienced judges should be attracted to appellate work and there should be adequate time and resources to produce excellent work, both in the correction of errors and in the development of jurisprudence. High-quality work is particularly important at the appellate level because the opportunities for further review are so limited and because appeal judgments, much more often than trial decisions, have an effect beyond the immediate interests of the parties.

### 2. Expedition

Appeals should be heard as soon after trial as possible and judgments returned quickly. However, the court does need time for reflection and for the preparation of judgments.

### 3. Accessibility

Geographical: To reduce litigant costs, more appeals should be heard near the place of trial.

Conceptual: The structure should be easily understood by the public.

### 4. Detachment

To ensure fair review of trial decisions, the appeal court must be - and must be seen to be - detached from the events, emotions and persons involved. (However, excessive remoteness, and the perception of it, must also be avoided.)

### 5. Consistency

The structure should foster consistent decisions and provide a mechanism to address inconsistent judgments when they occur.

## LONG-TERM STRUCTURAL OPTIONS

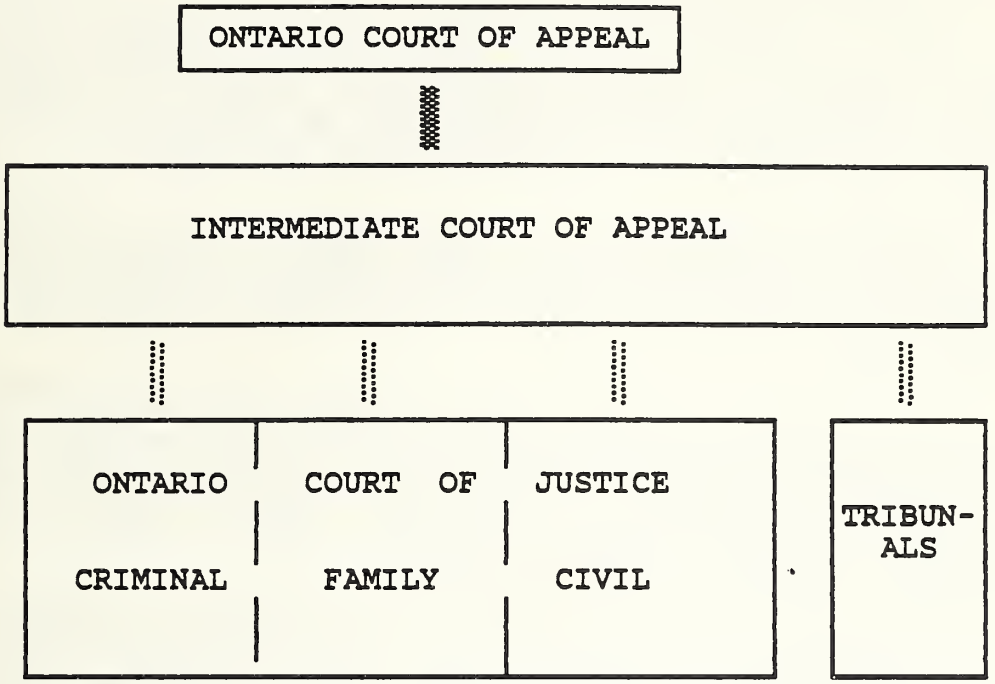
### 1. Introduction

The paper now moves to a consideration of the structural options available for appellate reform taking into account the problems and principles considered above. This discussion assumes the creation of a single-tier trial court with informal divisions handling trials in criminal, family, and civil law respectively. It also incorporates consideration of the large number of appeals and judicial review applications from administrative tribunals to the courts.

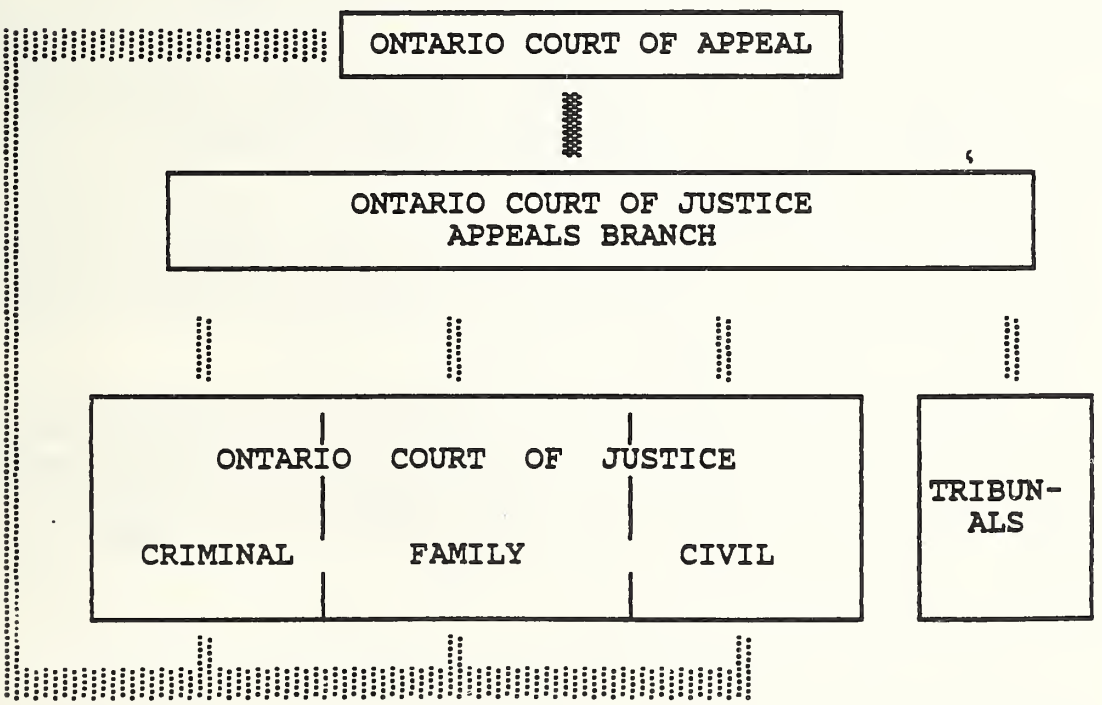
Two basic structures can be considered. The first is one having two tiers of appeal courts above the trial court, the so-called intermediate appeal court model. The second provides for a single appeal level following trial. Both structures are discussed below in detail, with a consideration of various models and options which could be featured in the structures, depending on their suitability. The diagrams which follow illustrate different models of each structure. Both structures have advantages and disadvantages.

## 2. Two-tier Structures

**Model I:**




**Model II:**



a) **What Model I Would Look Like**

An intermediate appeal court model is probably the most common approach taken by American states which have attempted appellate reform. In recommending an intermediate appellate court for Ontario, Mr. Justice Zuber noted that thirty-eight states have adopted some variation of this model.

Model I provides for an intermediate court of appeal with jurisdiction over all first level appeals (subject to a few exceptions noted below) and over judicial review from trial courts and tribunals. A small final court of appeal is reached by leave only.

A different process, used in some U.S. jurisdictions, sends all appeals directly to the top court, which screens cases to select those worthy of its consideration and refers the others to the intermediate court of appeal. A variation on this allows the top court to "reach down" and assume jurisdiction over cases it deems worthy of its attention.

Note that in implementing a standard intermediate appeal court model in an Ontario context, certain appeals could be heard at the trial level. For example, small claims appeals of deputy judges could be made to a single trial judge. Small claims decisions of trial judges would have to go to the intermediate court of appeal, but could be heard by one appeal judge.

Appeals of decisions of justices of the peace could be made either to a single trial judge or to a single judge of the intermediate court. Provincial Offences Act decisions of trial judges would go to the intermediate court of appeal.

The intermediate court of appeal could be made up of permanent appeal judges or a combination of appeal judges and trial judges. Trial judges provide built-in regionalization of appeal services. Permanent appeal judges would have to be itinerant in order to serve regional centres.

Based on rough estimates of sitting time, the intermediate court of appeal would number between 27 and 35 judges (or the equivalent in sitting time by trial judges sitting on appeal), depending on patterns in the use of one, two or three-judge panels. The top court would consist of 7 or 9 judges.

b) **Advantages of Model I**

The intermediate court would concentrate on the error-correcting function, leaving the small final appeal court, reached by leave only, to foster the orderly development of law

in the province. Because many appeals heard by the intermediate court would be less complex, hearings should be relatively expeditious. And, given the existence of the final court of appeal, the intermediate court could be expanded to meet demand with less concern about inconsistent judgments. Appellate case management techniques could be used to control caseflow and forestall unnecessary expansion.

The present use of terms like District Court and Divisional Court for appeal courts is confusing. The direction of all appeals to a "court of appeal" would improve public understanding of the structure.

c) Disadvantages of Model I

The disadvantages of an intermediate court of appeal model are significant. A hierarchical appeal structure is inconsistent with major themes of court reform - simpler, faster, less expensive justice. Model I establishes, in effect, a three-tier appeal system - an appeal to the intermediate court, a motion for leave to appeal to the top court and, if leave is granted, the final appeal court hearing. This potential to increase delay and expense is a major drawback. In the U.S. and Canada where final appeal courts hear cases by leave, no test for the granting of leave has been articulated in sufficiently clear terms to provide a degree of predictability on when leave will be granted, so as to give guidance to a party considering seeking leave to appeal. Those who argue in favour of the model dismiss these extra steps as insignificant because they affect only those few litigants who fully pursue their remedies. But this reasoning ignores the negative message sent to litigants: If you have the time and money, you may have full access to the justice system; otherwise content yourself with a lesser standard. This reasoning reinforces a trend in which only corporations, public institutions, and legally-aided litigants can afford to appeal. It moves away from greater access by all citizens to the court process.

A second major defect of the hierarchical nature of Model I is that it would cause poor morale on the part of the intermediate judges, who would complain of being perceived as less capable than judges of the top court, of being left with the less important, less challenging appellate work, of being responsible for large (sometimes too large) caseloads as the top court sets its own timetable, and of receiving a lower priority for resources. These judges' inferior status would discourage the recruitment of high calibre candidates. Similar complaints are often voiced by state court intermediate appeal judges in the United States. A parallel may be drawn to the concerns of Ontario's Provincial Court judges, which have been a significant impetus to the proposals to establish a single tier trial court.

The concept of an intermediate appeal court in Ontario may be perceived as a threat to the integrity of appellate courts in other provinces. An elite, final court of appeal in Ontario might attain a disproportionate influence in judicial decision-making across Canada and could diminish the significance of the decisions of other provinces' appeal courts. Ontario may have an obligation, as a partner in Confederation, to avoid tipping the national balance as it solves problems in its court system caused by the size of its population and economy.

A complication inherent in a model in which the final provincial court of appeal hears matters only by leave is the procedural inconsistency with criminal appeal access to the Supreme Court of Canada. The Supreme Court now hears criminal appeals from provincial courts of appeal as of right when there is a dissenting judgment in an affirmation of a conviction or when the court of appeal sets aside an acquittal. In Model I an accused who was convicted at trial, whose conviction was affirmed 2-1 in the intermediate court of appeal and whose leave application was denied by the final court of appeal in Ontario could be denied the right to appeal directly to the Supreme Court.

A possible solution would be to give an automatic right of appeal if the final provincial appeal court denies leave. Another possible solution would be to allow an appellant who had been denied leave by the final provincial appeal court to seek leave for an appeal before the Supreme Court. However, when several years ago the federal government attempted to make legislative changes to remove as of right criminal appeals altogether and allow the Supreme Court full control of its caseload, the proposal met strong opposition and was ultimately withdrawn. Model I is problematic to the extent that it affects access to the Supreme Court of Canada in criminal matters that have traditionally been appealable to that court as of right.

Another possible solution to this dilemma would involve bypassing the intermediate court in indictable criminal appeals and routing them directly to the final court in accordance with the current practice. All other appeals to the top court could be made by leave only from the intermediate court. This would mean a significantly larger top court since about three-quarters of the cases disposed of by the present Court of Appeal are criminal appeals. It would also reduce the potential of the final court to maintain an elite, jurisprudential focus.

d) Model II

A possible variant of the intermediate court model is an appeals branch of the unified trial court with broad but not

comprehensive appellate jurisdiction. Panels of three judges of the Ontario Court of Justice would hear appeals, sitting in the region where each matter originated. The concept could be described as a considerably expanded Divisional Court: the appeals branch would have all the existing jurisdiction of that court as well as the existing appellate jurisdiction of the District Court. Appeals of indictable offences and civil and family matters of considerable monetary value would go to the Court of Appeal as of right. Other appeals would be directed to the appeals branch, with a further appeal to the top court, with leave.

Areas within the jurisdiction of the present Court of Appeal could be carved out and transferred to the appeals branch. For example, the monetary limit of its appellate jurisdiction in civil matters could be fixed at $50,000, as compared to the Divisional Court's present $25,000 ceiling. Indictable sentencing appeals, which now constitute about half of the Court of Appeal's docket in the criminal area, could be directed to the appeals branch, leaving only conviction appeals to proceed directly to the Court of Appeal. However, sentencing appeals probably account for less than half of the time the Court of Appeal spends on criminal appeals. There is also the concern that appellants who would otherwise have appealed only the sentence will appeal convictions as well so as to reach the top court immediately. In other words, the net time-saving effect of the transfer of jurisdiction would be less significant than it appears at first.

The advantages of Model II are very similar to those of Model I. The Court of Appeal, remaining at its present size (something that many observers consider a significant benefit), would guide the development of the jurisprudence of the province; the larger appeals branch would perform the error-correcting function. Using the judges of a regionalized trial court would facilitate the provision of regional appeal services.

Model II likewise has many of the disadvantages of Model I. Probably the creation of an appeals branch of the unified trial court would be a less negative factor for judicial morale than the creation of an entirely new intermediate court, but some morale problems must be anticipated.

The disadvantages that are unique to Model II are related to the use of trial judges. Serious problems are associated with having appeals heard by judges of the same court as the judges appealed from. Would litigants perceive these judges as sufficiently detached to afford them a fair appeal? Judges sitting on appeal panels may be perceived as reluctant to overrule their colleagues - colleagues who may be hearing appeals

from their decisions next month. Proposals to use single judges of the trial court for appeals (for example, in summary conviction matters) present a heightened version of the same difficulty, but using three-judge panels for summary conviction appeals would require a significant and probably unjustified increase in the number of judges doing appellate work.

It might be suggested that the appeals branch could be named in such a way as to imply detachment. However, the fact that the judge or judges hearing an appeal sit in an appeals branch known as the "Intermediate Court of Appeal" does not really change the relationship, real or perceived, with the judge appealed from. (It should be noted that judges of the Divisional Court have not often been put in this position since that court hears relatively few appeals from High Court decisions. In the first phase of court reform, General Division judges sitting in the Divisional Court will face this situation more often given the Divisional Court's jurisdiction over civil appeals in matters under $25,000. Model II, however, would bring about a considerable increase in the volume of "intra-court" appeals with the addition of jurisdiction over summary conviction appeals.)

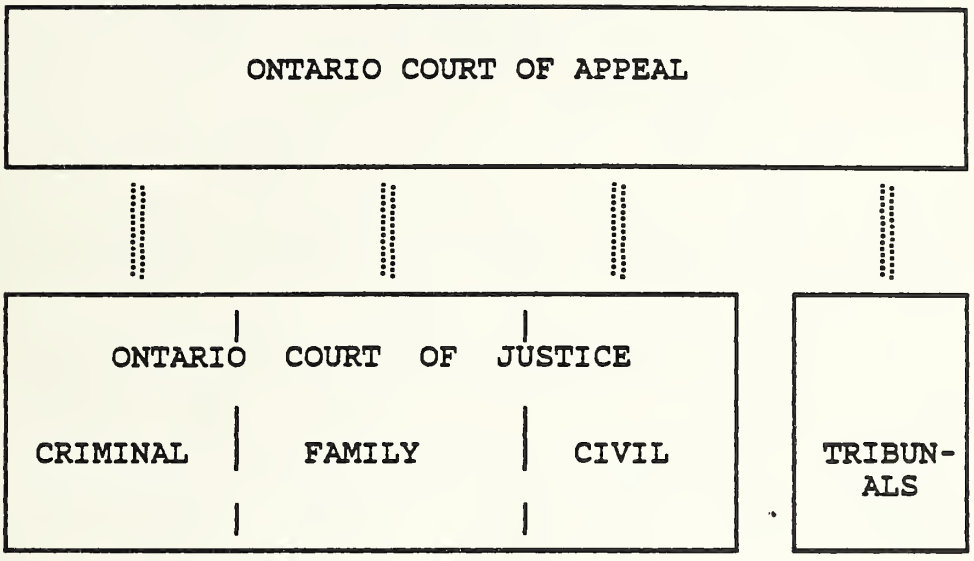
One means of addressing this problem in part is by restricting the participation of trial judges to a select group who would, based on their interest and ability, form the core of the appeals branch. This core group could be augmented by panel members drawn from the trial bench of the region in which the appeal arose. In Phase II the problem will remain as to whether the use of single trial judges in summary conviction matters is acceptable or not. If it is unacceptable, several additional judges will be needed to carry those appellate duties.

There is the further difficulty that consistency in decisions might be difficult to achieve in an appeals branch with a rotating membership drawn from the entire province, though this too would be addressed by the formation of a small, core group of appellate judges. There may also be concerns about the degree of expertise in administrative law matters available in a province-wide trial court consisting of judges specializing in criminal, family, and civil trial work.

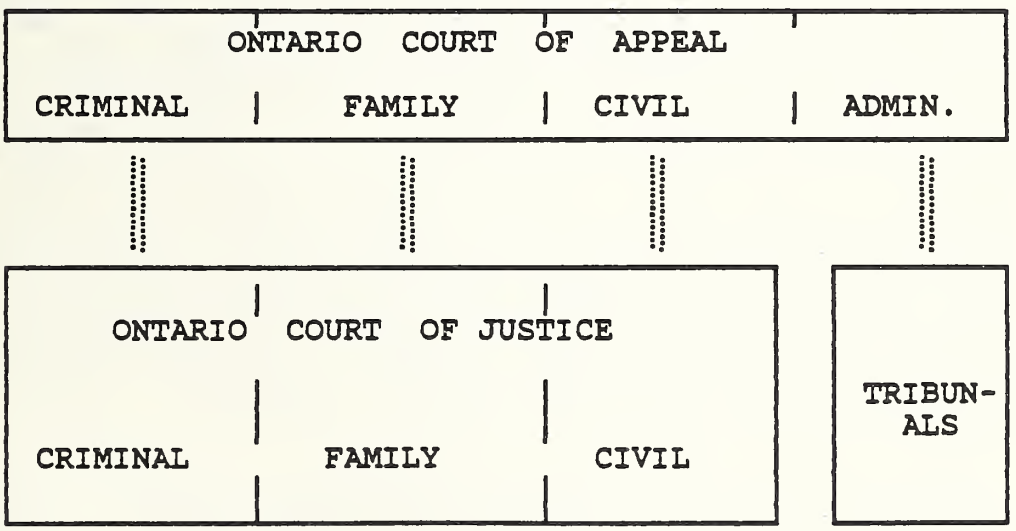
Another disadvantage results from the retention of a split in civil and family appellate jurisdiction between the appeals branch and the Court of Appeal which has little jurisprudential justification. A simple monetary criterion, while administratively practical, does not reflect the importance of many issues in custody or child welfare matters, for example, which arguably deserve the attention of the Court of Appeal.

## 2. One Tier Models

**Model III:**




**Model IV:**



a) **What Would Model III Look Like**

Model III envisages a single-level appellate court with very broad appeal and judicial review jurisdiction. With a few exceptions, the court of appeal would be both the first level and final level of appeal in the province. The court would be made up of permanent appeal judges, but could make use of trial judges as well. A bench made up exclusively of permanent appeal judges would be large. If single judges continued to hear summary conviction appeals, about twenty-seven full-time judges are estimated to be needed. This number could rise to thirty-five judges if three judge panels were used for most appeals.

The court could have the flexibility to sit in panels of one, three, or five depending on the urgency and importance of the case. Single judges could hear interlocutory appeals, less vital or urgent judicial review applications, small claims appeals and Provincial Offences Act appeals. The bulk of the appellate caseload would continue to be heard by three-judge panels. Significant cases like serious criminal appeals, Charter cases, cases involving public controversy, or situations where there are previous inconsistent judgments on a point of law could be heard by panels of five. The key characteristic of this model is tailoring the size of the panel to the importance or urgency of the case to ensure quality and consistency in an appeal court which does not rely on the supervision of a final appeal court.

To a much greater degree than has traditionally been necessary, effective management systems would be required. Increased support for the office of the chief justice to determine the priority of appeals and judicial assignments may be needed. This screening mechanism would also enable the chief justice to assign cases raising similar issues to the same panel. In addition, it would be advisable to explore case management strategies directed at minimizing the number of judges needed. (Note that these initiatives would be equally important in the context of an intermediate court of appeal, since it would be similar in size. In fact, there is no reason to believe that an intermediate court would be smaller than a single-tier appeal court. A final court concentrating on its jurisprudential role would do little to reduce caseload demands on the lower appeal court.)

This model would provide regional services by holding sittings in the regions in which appeals arose. For consistency and to ensure that an air of detachment prevailed, permanent appeal judges based in Toronto could provide these regional services. The chief justice could be empowered to call on trial judges with particular expertise in criminal, family, or administrative law as required to make up panels, thus providing

greater flexibility. The use of trial judges to augument appeal panels is not uncommon in other jurisdictions. In criminal matters, the English Court of Appeal has panels chaired by a single Lord Justice of Appeal, flanked by two criminal specialists from the Queen's Bench Division. Alberta's Court of Appeal uses a similar complement of trial judges to consider sentencing appeals.

b) **Advantages of Model III**

A single court offers the following advantages. Of primary importance is the fact that all litigants are on the same footing in the court system. Each has access to a trial of the issues followed by the right to a single appeal. This straightforward structure would be readily understood by the average citizen. The model also resolves the incongruity of the present structure in which appellants in serious criminal matters (indictable offences) have only one opportunity to appeal (to the Court of Appeal), although appellants in most less serious summary conviction matters potentially have two (to the District Court and, with leave, to the Court of Appeal). A two-tier structure with a leave-only top court (Model I discussed above) could resolve the incongruity in a different way, by allowing a further appeal in all matters. This is not a desirable solution, since it would increase the number of appeals and the resources needed, without apparent justification.

Another advantage would be elimination of judicial morale problems associated with the inferior status of an intermediate appeal court. All permanent appeal judges would have the same comprehensive appeal jurisdiction. Assignments would be made by the chief justice based on the experience, expertise and interest of individual judges.

c) **Disadvantages of Model III**

A large, single tier appeal court is an uncommon method of appellate reform. Most jurisdictions have adopted the two-tier model with permanent intermediate appellate judges. There is evidence, however, that a large, unified appeal court can function effectively. In the U.S. federal court system, the 9th Circuit Court of Appeals supervises trial courts in the nine western-most states including California, Hawaii, and Alaska, is responsible for about one sixth of the federal appellate case load, and has a membership of twenty-seven full-time appellate judges sitting in regional centres throughout the circuit. Large, randomly selected panels consider and rule on potential and existing intra-court conflicts. However, studies of the 9th Circuit Appeal Court have concluded that inconsistency is not unduly problematic, particularly when compared to the difficulties presented by other structural options.

A large single-tier appeal court might, by producing inconsistent decisions, fail to meet its responsibility of directing and developing the jurisprudence of the province. The argument could be made that a Court of Appeal up to twice as large as the present court would lack the cohesion, the sense of collegiality, necessary for consistent appellate decision making. The level of inconsistency which now arises in a court with sixteen full-time members might only be worse in this model.

Certainly, there would be significantly increased demands upon the chief justice to manage the court both in the traditional sense of administrative and personnel management and in terms of case management. Implementing such a system for the first time in Ontario would undoubtedly entail some novel practical challenges.

d) **Model IV**

A variation on Model III is one in which appeals and judicial review from courts and tribunals would be heard as of right by a large, specialized, single-tier appeal court numbering between 27 and 35 judges. The judges would be appointed on the understanding that they would spend most of their time in one division but would have the flexibility to sit in other divisions.

This model differs from Model III only in its use of defined, functional appeal divisions, corresponding to those of the unified trial court, with the addition of an administrative division responsible for appeals and judicial review from tribunals.

Another variation would consist of just two divisions, criminal and non-criminal, which would provide a simpler structure and more flexibility in the use of judges. The emphasis on expertise in family and administrative law at the appellate level would be diminished, however.

Specialization at the appellate level recognizes the breadth and complexity of contemporary law and the fact that judges who are expert in the major fields can provide better quality, faster and, ultimately, less expensive decision-making than generalists. The recognition of specialization would be particularly significant in family and administrative law, since traditionally fewer specialists in those areas have been appointed to the appellate bench.

However, a danger inherent in this model is the potential for judges in each section to become isolated within their specialty and lose the ability to take an overall perspective on the development of jurisprudence. And, as noted previously, it is more difficult to achieve specialization in a regionalized system.

**SPECIAL ISSUES: EXTRAORDINARY REMEDIES AND JUDICIAL REVIEW, SUMMARY CONVICTION APPEALS, BAIL REVIEW**

Before Phase I of court reform, extraordinary remedies applications in criminal and provincial offence matters were heard by a High Court judge; an appeal was available to the Court of Appeal as of right.

Summary conviction appeals were heard by District Court judges in the 49 counties and districts.

Bail hearings outside Toronto in cases other than murder and certain rare offences such as treason were usually conducted by justices of the peace. The same was true in Toronto, although more non-murder bail hearings were conducted by provincial judges in Toronto than elsewhere. The hearing of bail applications by justices of the peace in cases other than murder will continue and probably increase in Phases I and II.

The review of bail orders generally was conducted by District Court judges. In Phase I these reviews will be conducted by Ontario Court (General Division) judges. The review of bail orders made by High Court judges in murder cases was conducted by the Court of Appeal, which will continue to carry this jurisdiction in Phase I.

Habeas corpus applications in civil matters were heard by a High Court judge; an appeal was available to the Divisional Court and then to the Court of Appeal.

Judicial review applications in civil matters were heard by the Divisional Court, except that in cases of urgency they could be heard by a single judge of the High Court. An appeal to the Court of Appeal, with leave, was available in either case.

In Phase I, Ontario Court (General Division) judges will take the place of High Court and District Court judges in these procedures.

A single level trial court presents some novel questions in how to handle access to extraordinary remedies and judicial review, appeals of summary conviction matters and bail reviews.

These questions are more easily addressed in a structure with a two-tier appeal court. Below is a discussion of how they could be handled in Model I, II (two-tier), and in Model III (one-tier). Model IV's (one-tier) handling of these questions would mirror Model III because of the similarity in structure.

Model I

A two tier appellate structure with permanent appeal judges quite readily accommodates extraordinary remedies and judicial review, summary conviction appeals and bail review in the context of a unified trial court structure.

Extraordinary remedies and judicial review applications could be heard by panels of intermediate appeal court judges in the appropriate regional centre. A single intermediate court judge could consider the matter in Toronto in cases of urgency. An appeal could be available with leave to the final court of appeal in either instance.

Single intermediate court of appeal judges could sit in the appropriate regional centre to hear summary conviction appeals. These services could be offered in other centres in remote areas or where there are sizeable caseloads, with an appeal by leave to the final court of appeal.

Bail reviews from justices of the peace could be conducted by trial court judges. If the original bail hearing is conducted by a trial court judge a single intermediate court of appeal judge sitting in the appropriate regional centre could conduct the bail review. In murder cases, it may be appropriate for the final court of appeal to have jurisdiction over bail review, although administratively it would be more efficient to assign jurisdiction for all bail reviews to the intermediate court of appeal.

Model II

This model would be characterized by a structure in which trial judges become members of an appeals branch of the trial court similar to the present Divisional Court, although with substantially increased jurisdiction in the field of criminal appeals.

With respect to extraordinary remedies and judicial review, the most suitable approach is probably to give this jurisdiction to the appeals branch and assign panels of three trial judges to consider applications on a regional basis. Cases of urgency could be heard by a single judge of the final court of appeal in Toronto. An appeal with leave could be available to a panel of the final court of appeal.

There are two possibilities for summary conviction appeals. Either a single judge of the trial bench would hear the appeals, sitting as a member of the appeals branch, or three trial judges could be used. Even though the appeals branch would have a different name, there would be an insufficient degree of

detachment perceived between the trial court and a single judge of that court sitting in its appeal branch. The first option is, therefore, extremely unattractive. The second option is also problematic in that it demands a threefold increase in judge power to hear summary conviction appeals now (and in Phase I) heard by single judges.

The most sensible method of dealing with bail review of a judge's order would be to assemble panels of local trial judges in the regional centres for the relatively few hearings in these matters.

**Model III or IV**

Extraordinary remedies, summary conviction appeals and bail reviews could be heard in the trial court or the single appeal court. As a single appeal court with a single trial court is a novel concept in this country, the discussion of Models III and IV that follows is more extensive than the discussion of Models I and II.

One way to deal with access to extraordinary remedies and judicial review in a system with a unified trial court and single-tier appeal court would be to allow the Court of Appeal to exercise jurisdiction in this field. Three-judge panels could consider most applications. In cases of urgency, a single judge could conduct the hearing. An appeal of the order of a single judge could be made as of right to a three-judge panel of the Court of Appeal.

In this way, the appearance of an independent review of lower court decisions could be ensured because judges of a separate court would be hearing the applications. In addition, there is probably greater potential to develop expertise in dealing with judicial review and extraordinary remedy matters in a centrally-based appellate court than in a trial court with judges spread across the province.

On the other hand, regional services would be harder to deliver if only judges of a centrally-based court were charged with these duties.

Another option would be to confer judicial review and extraordinary remedies jurisdiction on the Ontario Court of Justice. Three trial judges in the region in which the case arose could conduct the hearing, except in urgent cases, when a single appeal judge based in Toronto could do so. An appeal could lie as of right to the Court of Appeal.

This method offers better access to judicial review for non-Toronto litigants in many cases, while at the same time ensuring speedy access to a single judge in cases of urgency. However, there would probably be less expertise on the trial bench in fields like administrative law in some regions, notably those outside Toronto. In addition, this option represents a reversal of the trend in Ontario, initiated by the McRuer Report, to develop a court (the Divisional Court) with special expertise in administrative law.

Another possible disadvantage is that it might be more difficult for three trial judges to reverse a colleague than for a judge from a separate court to do so. This problem may be even more pronounced if the trial judges are from the same region as their colleague.

The fact that a litigant in this model would continue to have the right to appeal a judicial review order from a single appeal judge or from a three-member trial judge panel to the Court of Appeal offers a reasonable counterweight, however, to any lack of expertise or inadequate detachment on the part of trial judges conducting judicial review.

In a single-tier court system, panels of trial judges from the region in which the appeal arose could hear summary conviction appeals in the regional centres and in those county towns where the distance to the regional centre would create accessibility problems. Other centres with relatively high caseloads, such as Windsor and Kingston, could also have local summary conviction appeal services.

Using multiple-judge panels could provide the appearance of detachment from the trial decision even though the trial and appeal judges may be drawn from the same court and region. This method also avoids the problems associated with an itinerant court which are discussed below. The use of local judges could mean appeal hearings would be held earlier.

However, this model also means that three judges would be used for the amount of work that is now done by a single appeal judge. Furthermore, the use of multiple-judge panels could lead to difficulties in scheduling trials and appeals on a regional basis, to lengthier hearing time for appeals and to more reserved judgments. One has to ask whether all summary conviction appeals need the attention of three-judge panels and to consider the problems such an increase in resources would probably entail.

A preferable option would be to have summary conviction appeals heard by single judges of the Court of Appeal in the

appropriate regional centres and in certain other communities as noted above.

This method provides the necessary detachment from decisions of the local trial judges who conduct the summary conviction trials. It also provides for efficient use of judicial resources in that a single judge would continue to be used for what are usually viewed as less vital appeals. In particularly sensitive or important cases the chief justice could assemble a larger panel including, if desired, members of the regional trial bench.

This model does, however, raise concerns associated with an itinerant court, for instance that appeals now heard promptly by local judges would be delayed while waiting for the circuit appeal judge, or that circuit judges might curtail hearings of appeals on the list in order to meet their scheduled obligations in another regional centre.

In most communities outside Toronto, however, summary conviction appeals are not numerous enough at the present time to require more than one appeal sitting a month. This level of demand is unlikely to lead to significant scheduling problems if single appeal judges based in Toronto are used, particularly given that the appellate circuit would be restricted to regional centres and a few other communities (unlike, for example, the present High Court circuit which encompasses forty-nine locations). It is also worth noting that three of the other regional centres are within commuting distance of Toronto. The remaining four are readily accessible by air from Toronto. The sittings required and the relative ease of accessibility to the regional centres reduces, to a considerable extent, concerns about the itinerant nature of a summary conviction appeal court staffed by single appeal court judges. In special circumstances such as when an appellant is in custody, he or she could seek an earlier appeal in Toronto instead of waiting for the regular appeal sittings in the regional centre.

In Phase II a bail order made by a justice of the peace would be reviewed by a criminal trial judge of the Ontario Court of Justice. This discussion deals, therefore, only with bail reviews in murder cases, certain other rare offences, and those relatively few lesser cases in which a trial judge would hear the bail application.

One option would be to allow a judge of the Court of Appeal to conduct any review of bail orders made by trial judges. This method has two advantages. First, it provides an adequate degree of detachment from the judge who conducted the bail hearing. Second, assigning a single appeal judge makes the optimum use of judicial resources. It also continues the existing procedure of a review conducted by the Court of Appeal in serious cases.

Another possibility which might offer better local accessibility would be to allow a panel of trial judges from the region in which the accused is being held to conduct the bail review. In order to provide a degree of detachment, more than one judge would be needed, although in relative terms the number of times these panels would need to be assembled would be small.

## SUMMARY OF OPTIONS FOR A NEW APPEAL COURT STRUCTURE

The removal of the General Division as an appeal court in Phase II poses a formidable challenge. Changes to the existing system are necessary, but no appeal structure can be entirely problem-free.

Two-tier appeal models are common throughout the U.S. state court system and recommended by several commentators on appeal court reform. Most significantly, an appeal court structure with an intermediate court and a small final court of appeal would provide a mechanism for consistent development of the province's jurisprudence. However, the hierarchical structure of the model is a significant flaw.

Hierarchy leads to delay, increased costs and public confusion. The leave to appeal mechanism is also problematic. It has proven difficult to develop clear and predictable tests for leave application. Moreover, the morale problems of the judges on the intermediate court could gnaw away at the soundness of the institution. To entrench hierarchy at the appeal level would appear to be inconsistent with the major themes of court reform in Ontario: a faster, less costly and simpler justice system.

A modified two-tier approach, creating an appeals branch of the unified trial court, presents many of the same problems. In addition, directing appeals to three-judge panels drawn from the trial court is problematic, especially because such panels may be perceived as insufficiently detached from their fellow trial judges whose cases they are reconsidering.

A single-level appeal structure would be a significant departure from some earlier recommendations. The model can be attacked for its size. Such a large court, it can be argued, might lead to inconsistent judgments. The demands for effective judicial management and for the development of mechanisms to screen and set priorities for cases based on how vital and urgent they were are unavoidable. These challenges must be faced, however, in an intermediate court model which would be similar in size to a single tier appeal court. There is the danger that a court with responsibility for all appeals, from murder to minor theft, from civil claims valued in the millions to small claims, would not speak with sufficient authority.

A single-level appeal court does, however, offer many of the same advantages as the one-level trial court. The structure is easily understood by lawyers, litigants, and the public - one trial, then the right to one appeal. The morale problems among judges caused by hierarchy are avoided. The predominant use of permanent appeal judges whose expertise reflects the appellate caseload could promote high-quality judgments. Informal specialization also responds to concerns that a large court may lack consistency of decision-making. Judgments on significant issues could be delivered by panels of five or more judges which would provide an authoritative voice on important issues comparable to a final court of appeal in a two-tier structure.

None of the three major options offers a solution to appeal reform which is without problems. These problems need to be fully examined to determine whether adequate safeguards could be developed to enable one model to emerge as the model most likely to provide effective appellate services for Ontario.